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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1489

STATE OF NEW JERSEY,

Petitioner,

vs.

JOSEPH S. PORTASH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The petitioner State of New Jersey respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on June 29, 1977.

Opinion Below

The following opinions of the state courts are reproduced in the appendix: the Orders of the Supreme Court

of New Jersey denying certification and dismissing the appeal, not yet reported; the opinion of the Superior Court of New Jersey, Appellate Division reported at 151 N. J. Super. 200, 376 A. 2d 950 (1977), and the unreported judgment of conviction of the Superior Court of New Jersey, Law Division.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on January 17, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 *U.S.C.* §1257(3).

Questions Presented

1. May a defendant invoke the benefit of the privilege against self-incrimination without having properly asserted it at trial?

2. Does the privilege against self-incrimination shield a defendant from cross-examination with his materially inconsistent statements given after he was granted immunity from the use of any adverse evidence derived from his grand jury testimony in any subsequent prosecution except for contempt, false swearing, or perjury?

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment V

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *

New Jersey Public Employees Immunity Statute, N.J.S.A. 2A:81-17.2a2*

> If any public employee, having claimed the privilege against self-incrimination, testifies before any court, grand jury or the State Commission of Investigation after having been informed that his failure to appear and testify would subject him to removal from his office, position or employment, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury or false swearing committed while so testifying.

Statement of the Case

Respondent Portash was prosecuted for misconduct in office (contrary to N.J.S.A. 2A:85-1) and extortion by a public official (contrary to N.J.S.A. 2A:105-1). In September or October of 1972 his crime was discovered and reported to the police by Constance Kulpinski, an assistant bookkeeper at the Madison Agency, a realty and insurance brokerage firm in Lakewood, New Jersey. At the time Portash was a member of the Ocean County Board of Freeholders, a member of the Manchester Township Committee as well as mayor of that town, Executive Director of the Pinelands Environmental Council, and a self-appointed member of the Manchester Township Munici-

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* The statute was subsequently amended, L. 1975, c. 246, §2, to alter its self-executing nature.

pal Utilities Authority (See 2T33-11 to 25).* It was learned from Ms. Kulpinski and records of Madison Agency that Portash had accepted approximately $31,730, less taxes from Donald Safran, part-owner of the agency, for a "no show" job. The employment was a conduit for illegal payments by Leisure Technology Corporation, a major real estate developer in Ocean County, for favorable treatment by Portash in his capacity as a public official. The Madison Agency was a convenient intermediary, since the president of Leisure Technology, Robert Schmertz, was also a principal in the agency.

Following commencement of the investigation, it was represented to State law enforcement authorities that Portash was willing to discuss the matter and cooperate with them (2TH24-22 to 24; 3TGJ29-21 to 23). Accordingly, on October 29, 1974 the State subpoenaed certain documents from Portash relating to his employment at Madison Agency, including site evaluations. Portash, however, objected to the subpoena at an *in camera* hearing on November 6, 1974, on the ground that production of the documents would infringe his right against self-incrimination. The court rejected this argument and ordered Portash to produce and identify these documents before the State Grand Jury. Fearful that his client might be exposing himself to charges such as obstruction of justice for producing fabricated documents, Portash's attorney stated that his client would not represent their authenticity or accuracy (TH2-11 to 28-13).

Pursuant to another subpoena Portash appeared in court on November 14, 1974. Since the State considered

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* The State will utilize the same transcript designations as in its State Court briefs, see Appellate Division Brief at pp. 2-3 and Supreme Court Brief at p. 2.

his testimony desirable for the prosecution of Schmertz and Leisure Technology (2TH24-25 to 25-22), it agreed to grant immunity from use of any adverse evidence derived from his grand jury testimony in any subsequent prosecution except for contempt, false swearing or perjury. It was made clear to Portash, however, that evidence had been presented to a separate grand jury and no representation was made insofar as prosecution for offenses committed as shown by that evidence (2TGJ3-7 to 17). Respondent then testified before the State Grand Jury. The substance of his immunized testimony pertained to the documents he had submitted on November 6, 1974, which he admitted were fabricated after the State Police began investigating him in 1972 (3TGJ4-5 to 7-16). He also admitted that one of the letters relating to his employment which he had shown to Detective Feldherr (Exhibit SGJ17) had been prepared after the State investigation commenced and not at the time indicated on the letter (3TGJ13-21 to 15-3).

Approximately two weeks after Portash's grand jury testimony, "charge bargaining" discussions took place to avoid the necessity of his indictment (See 2TH34-1 to 5). These discussions incorporated several prerequisite conditions upon which there had been general agreement: Portash was to resign from his position as mayor of Manchester prior to January 1, 1975; he was expected to cooperate in the case including the prosecution of Schmertz and Leisure Technology, and most importantly from the State's viewpoint, he was to cooperate in the investigation of a contract between the Pinelands Environmental Council and Meridian Engineering which was deemed more significant than the instant case (2TH26-11 to 27-15). Very soon after these initial "charge bargaining" discussions, the State made it known that it would also require restitution of the amounts which Portash received through Madison Agency (2TH27-1 to 6).

Portash failed to honor his commitment to resign as mayor by January 1, 1975 (2TH27-15). Subsequently, there was a request to extend the date to February 1, 1975, to which the State reluctantly agreed. Portash, however, again failed to comply with this prerequisite (2TH 35-4 to 7).

In a telephone conversation with the investigating deputy attorney general, Alfred Luciani, on the evening of February 4, 1975, Portash's attorney vehemently opposed restitution of the full amount of the money Portash had received after taxes, *i.e.* $24,322, arguing that the sum was just too high. Mr. Luciani later discussed this impasse with the Director of the State Division of Criminal Justice, who conceded that the money differences could be resolved. It was decided that in the meantime the Portash prosecution would be deferred but they would proceed as scheduled to obtain the indictments against Schmertz and Leisure Technology (2TH27-16 to 28-6). As a condition of holding off on Portash's indictment, however, a statement was taken from him the next day, February 5, 1975, in anticipation of his cooperation in the Schmertz trial (2TH14-2 to 15; 20-1 to 22-7).

The non-immunized February 5, 1975 statement generally concerned the circumstances of Portash's employment with the Madison Agency and favorable treatment accorded to Leisure Technology. It included a significant admission by Portash:

> Q. Did you know at that time when you originally accepted the offer that Mr. Schmertz had an interest in Madison Agency?

> A. No, not initially. I didn't know until about two weeks later. (TS3-16 to 20).*

He also admitted correlating in his own mind his employment at Madison Agency and Leisure Technology's application to the Utility Authority for a franchise, stating that it gave him an awkward feeling that he was being used. He felt "obligated to the corporation . . . [b]ecause of the employment at the Madison Agency." (TS12-21 to 13-3; 15-3 to 9). According to his statement, "it was a contributing factor" to his decision on the franchise application (TS15-21). Finally, he again acknowledged fabricating some of the site applications (TS21-13) and the letter justifying his $15,0000 annual salary at Madison Agency (TS25-1 to 26-4).

Later in February 1975, Portash met twice with another deputy attorney general assigned to handle the Schmertz trial to review his anticipated testimony in that case (2TH33-7 to 18). Portash's attorney also met with Deputy Attorney General Luciani to discuss the question of restitution. At that time Portash's attorney indicated that the money question could be negotiated; he also discussed Portash's mental state as well as the terms of his resignation (2TH28-7 to 17). There followed some telephone conferences (2TH35-12), and during the next two or three weeks the State indicated that if it settled the restitution question for $15,000, as proposed by Portash's attorney,

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* In his Appellate Division brief respondent Portash represents that if he had testified at trial, "he would have indicated that he had no knowledge of any connection between Leisure Technology and the Madison Agency at the time of his employment and indeed never learned of the fact that Schmertz [*sic*—Safran] had an equal but silent partner during his employment." (Respondent's Appellate Division brief at p. IV).

the State would require Portash to resign from his position as Executive Director of the Pinelands Environmental Counsel (2TH17-1 to 10; 21-3 to 25; 38-12 to 19). Otherwise the State would stand by its original offer to accept $24,322, resignation from the township committee and position of mayor, and cooperation in the Schmertz and Pinelands Environmental Council cases. The State added the alternative proposal in light of information received during preliminary discussions with Portash which justified Portash's resignation from the other position of public trust (2TH29-3 to 15).

On March 27, 1975 Portash's attorney met with the State's representatives to discuss the alternatives (2TH29-15 to 19). A written document (S-1) incorporating the terms of the proposals was drawn up (2TH36-24 to 37-14). His attorney indicated that Portash was going away for a few days to think it over (2TH35-18 to 20). After Portash returned, his attorney contacted the State's representatives and asked them to talk directly with Portash. The investigating deputy reluctantly agreed to this extraordinary request and spoke with Portash on the telephone for over an hour. Portash indicated that he was troubled about making the right decision, asserting that he had done nothing wrong and that to return the money and resign would be too much for him to bear. Consequently, he rejected both alternatives and decided to defend against the charges (2TH29-20 to 31-8; 35-17 to 36-1).

The State, which had been led to believe by Portash's representations that he would cooperate and abide by the prerequisites throughout the course of the discussions, was left with no recourse but to present the case to the State Grand Jury. The indictment was returned on April 24, 1975 (2TH15-12 to 20; 31-8 to 32-22; 36-1 to 6).

Prior to Portash's trial the defense sought a ruling on the use of respondent's immunized testimony and subsequent statements at the pretrial hearing on December 15, 1975. Defense counsel argued that these materials could be used if respondent took the stand and perjured himself (2TH96-24 to 97-1), but contended that they could not be used otherwise, either on the State's case, cross-examination or rebuttal (2TH97-5 to 13; 102-8 to 10). The court ruled that it would not make an anticipatory evidentiary ruling before trial, although it was inclined to believe that materially inconsistent statements could be used solely for impeachment purpose under the rationale of *Harris* v. *New York*, 401 U.S. 222 (1971) (2TH 102-20 to 109-7). Following this hearing respondent obtained another attorney who was duly substituted as trial counsel.

The defense renewed its request for an anticipatory ruling after completion of the State's case on February 5, 1976, arguing that truthful immunized testimony should be excluded from any use whatsoever and suggesting that the prosecution should be confined to questioning defendant on his limited direct testimony (10T50-17 to 59-18). The prosecution noted that the court was faced with three possible situations: respondent might repudiate his prior testimony as untruthful in whole or part; he might testify in accordance with prior truthful statements, which created no problems; or he might admit that the prior statements were truthful but would testify falsely at trial. Assuming that the court was faced with the last situation, then the State maintained he would be giving advance notice of the intent to perjure himself at trial, which would be a fraud perpetrated on the court in an attempt to secure a deliberately false judgment. The prosecution argued that this situation fell within the ambit of the *Harris* rationale and also noted that if defense counsel knowingly participated in such a fraud, he would be subjecting himself to disciplinary action (10T60-16 to 61-25).

Defense counsel protested that his client would testify only to the truth, would not discuss his grand jury testimony in any way and that, in any event, the only remedy for false testimony would be a subsequent prosecution for perjury or false swearing (10T66-5 to 67-10). The court reiterated that in accordance with *Harris* v. *New York*, the State should be able to impeach with prior materially inconsistent statements (10T70-12 to 72-24), and questioned how it could make an advance ruling on materiality without "digesting the testimony." (10T77-10). Moreover, the prosecution noted that if the defense representations were accurate that respondent would testify truthfully, the whole discussion was academic (10T112-3 to 17). The court concluded that it would defer ruling and handle the matter on a question-by-question basis, requiring questions related to the grand jury testimony to be first posed at side bar for a specific ruling (10T112-18 to 113-12).

Further argument was heard in chambers on February 9, 1976. Defense counsel argued that in view of the number of Portash's statements and conversations after immunity was granted, it would be "nightmarish" for the court to determine consistency and inconsistency unless the court first conducted a *voir dire* of respondent's testimony and make advance rulings on the prosecutor's questions (12T12-13 to 13-25; 50-7 to 51-10). The prosecution objected to a trial run of respondent's testimony or to any attempt by respondent to curtail effective cross-examination based on the State's case-in-chief by limiting the scope of respondent's direct examination (12T52-12 to 53-18; 60-10 to 20). The court observed that respondent could be cross-examined about anything reasonably related to evidence in the case-in-chief separate and apart from the grand jury testimony, and that the court could not give an advance evidentiary ruling on every question posed (12T62-8 to 73-6).

Following a recess defense counsel announced that he could not advise his client to take the stand in light of the court's ruling (12T81-20 to 82-16). Counsel renewed his request for a *voir dire* of defendant's testimony, and the court responded:

> What you're asking the Court for is plenary, evidentiary rulings in advance which the Court, even if it were inclined to do so, is not permitted. There is no such thing as a dry run in a criminal case. (12T91-19 to 22)

The colloquy ended with a representation by defense counsel that it was defendant's decision not to take the stand (12T97-6 to 20). Respondent was subsequently found guilty by the jury of extortion and was given a suspended sentence.

On appeal the Superior Court of New Jersey, Appellate Division held that although the evidence supported the jury's verdict of respondent's guilt, the trial court's ruling which would have permitted the State to use respondent's immunized grand jury testimony for impeachment purposes had impaired respondent's right to testify on his own behalf. The Appellate Division found that in reliance on the trial court ruling and fearful of the use to which the grand jury testimony would be put, respondent decided against testifying. It, therefore, reversed the conviction and remanded for new trial. On January 17, 1978, the Supreme Court of New Jersey dismissed the State's appeal as-of-right and denied the State's petition for certification.

REASONS FOR GRANTING THE WRIT

POINT I

Respondent lost the benefit of privilege against self-incrimination by failing to testify before asserting the right with respect to immunized grand jury statements.

In essence the Appellate Division reversed respondent's conviction because he had "sought the trial court ruling under consideration as a basis upon which to decide whether to testify in his own behalf" and "[i]n reliance thereon, and fearful of the use to which the grand jury testimony would be put, he decided against testifying." In the opinion of the intermediate review court, the verdict was, therefore, based on partial evidence and reversal of the conviction was required. 151 N. J. Super. at 209, 376 A. 2d at 955. The nature of respondent's claim was premised on a mechanistic asserting of the Fifth Amendment privilege against self-incrimination. He contended that if the grant of immunity was to be co-extensive with the privilege, then it would not be constitutional to permit a prosecutor to impeach the testifying defendant with his inconsistent immunized grand jury statements. Nevertheless, it must be emphasized that at no time during the trial did Portash properly invoke his Fifth Amendment privilege. Thus, any potential violation of the privilege is purely speculative. As will be demonstrated, the proceeding in general involved no unfairness, and the due process clause and the Sixth Amendment right were not implicated.

The Fifth Amendment addresses the compulsion of tesmony from a witness. "It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the

privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *Garner* v. *United States,* 424 U.S. 648, 654-655 (1976); *United States* v. *Monia,* 317 U.S. 424, 427 (1943). The privilege against self-incrimination is one which normally must be claimed by the individual who seeks to avail himself of its protection. *Communist Party of United States* v. *Subversive Activities Control Board,* 367 U.S 1,107 (1961). There, this Court recognized that "[m]erely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated." *Id.* at 71. See generally *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288 (Brandeis, J. concurring at 346-348).

So, too, in this case respondent prematurely attempted to assert a Fifth Amendment claim both prior to trial and before deciding whether to testify on his own behalf. Since respondent did not actually testify, it can only be speculated whether he genuinely intended to take the stand or even whether he might not have undergone a last-second change of heart if the court had ruled in his favor, particularly after it was made clear to him that by limiting his testimony to certain matters he could not restrict the State's cross-examination with all the evidence in its case-in-chief. Until respondent took the stand and testified, it was impossible to anticipate the exact content of his testimony or delimit the scope of possible cross-examination based on such direct examination testimony. Thus, it would have been ineffective to conduct any sort of *voir dire* or trial run of respondent's intended testimony, as his counsel requested. It would have been impractical to determine whether respondent's prior statements would be inconsistent with this testimony, and premature to determine whether the immu-

nized grand jury statement was true or false. See *United States* v. *Moss*, 562 F.2d 155 (2d Cir. 1977), *U.S. cert.* filed Nov. 8, 1977 (No. 77-661, 22 *Cr.L.* 4112) (discussed *infra*). It is submitted that the Appellate Division erred in anticipating the constitutional question in advance of the necessity for deciding it, and formulating a broader rule than required by the precise facts to which it applied. See *Ashwander* v. *Tennessee Valley Authority*, *supra*, 297 U.S. at 347-348.

Petitioner submits that the trial court adopted the best course of action under the circumstances, deferring its ruling and requiring the prosecution to pose any questions implicating immunized testimony at side bar out of the hearing of the jury for a ruling on admissibility. Respondent was protected by this procedure and it would have been appropriate for him to press his specific objections at the time when the judge could best and most expeditiously evaluate the issues in the full light of the evidence presented. If the trial court had then rendered a ruling which respondent deemed erroneous, his remedy was to testify truthfully and challenge the ruling on appeal. Instead he adopted a strategy, sanctioned by the Appellate Division, which foreclosed proper consideration of the issue at trial. Respondent's representation that he had decided not to testify based upon the trial court's decision, can only be considered a pretext to undermine the verdict and create a colorable issue on appeal. By refusing to testify respondent lost or waived the benefit of the privilege with respect to his prior immunized testimony. His claim would ripen only after the prosecutor propounded a question involving respondent's immunized grand jury statement. Until then it was of "a hypothetical or abstract character." See *Flast* v. *Cohen*, 392 U.S. 83, 100 (1968); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). It was specious for him to argue that

the trial court's "ruling prevented him from taking the stand." citing *Dombrowski* v. *Pfister*, 380 U.S. 479 (1975). (Respondent's App. Div. reply brief at p. 4). Petitioner submits that the Appellate Division erred in accepting this rationale. Respondent had the opportunity to testify if he so desired and he received a fair trial.

The claim raised by respondent arises solely under the Fifth Amendment of the United States Constitution, and federal standards must govern in determining the sufficiency and temporal propriety of that claim. Under the facts set forth petitioner submits that respondent has not satisfied the standards established by this Court for a valid assertion of the privilege against self-incrimination.

POINT II

The State should be permitted to impeach a defendant with materially inconsistent statements given after the grant of immunity.

The uncontested facts in this case present a far more complex constitutional issue than the simplistic treatment in the opinion of the Superior Court, Appellate Division. The State reviewing court focused on a significant question which is novel to New Jersey courts but has recurred in other jurisdictions including the federal courts with varying results. Petitioner submits that it is timely for this Court to issue a definitive opinion on the question whether the privilege against self-incrimination shields a defendant if he testifies at trial on his own behalf and his prior inconsistent statements given after the grant of immunity indicates that he may have committed perjury.

Respondent's grand jury testimony was obtained after the State granted him statutory immunity from adverse

use of that testimony in any subsequent prosecution except for contempt, false swearing or perjury. Thereafter, Portash gave a number of statements in anticipation of his cooperation in a co-actor's trial. The power of a court to compel persons to appear and testify in court or before grand juries is firmly established. *United States* v. *Calandra*, 414 U.S. 338, 346 (1974); *Kastigar* v. *United States*, 406 U.S. 441, 444 (1972). The duty to testify has long been recognized as a basic obligation that every citizen owes to his Government. The general common law principle that "the public has a right to every man's evidence" is particularly applicable to grand jury proceedings. *Calandra* and *Kastigar*, both *supra*. This power is necessary to assure the effective functioning of government since such testimony constitutes one of the Government's primary sources of information. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 93-94 (1964). More specifically, the grand jury occupies a special role in insuring fair and effective law enforcement: it does not adjudicate but investigates to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigatory power must be broad if its public responsibility is adequately to be discharged. *United States* v. *Calandra*, *supra* at 344-345; *Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972). The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered, even information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination. *United States* v. *Calandra*, *supra* at 345-346; *Lawn* v. *United States*, 355 U.S. 339 (1958).

Of course, the grand jury's power is not unlimited. As explained in *Calandra*, the grand jury may consider incompetent evidence but it may not itself violate a valid

privilege, constitutional or otherwise, such as forcing a witness to answer questions in violation of his Fifth Amendment privilege against self-incrimination. Rather, the grand jury may override a valid Fifth Amendment claim only if the witness is granted immunity co-extensive with the privilege against self-incrimination. 414 U.S. at 347; see *Kastigar* v. *United States*, *supra*. Immunity statutes have historic roots deep in Anglo-American jurisprudence and are not incompatible with the values underlying the Fifth Amendment privilege. Such statutes seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. Their existence reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. *Id.* at 446-447.

New Jersey has enacted an immunity statute relating to the duty of every public employee to appear and testify before the grand jury on matters directly related to the conduct of his office. N.J.S.A. 2A:81-17.2(a)(2). This statute complies with constitutional principles. *Zicarelli* v. *New Jersey State Commission of Investigation*, 406 U.S. 472 (1972).

It is significant that both the federal and the New Jersey immunity laws exclude from protection perjured testimony. This Court has stated that the privilege against self-incrimination "does not condone perjury." *United States* v. *Wong*, —— U.S. ——, 97 S.Ct. 1823, 52 L.Ed.2d 231 (1977). It grants a privilege to remain silent without risking contempt, but it "does not endow the person who testifies with a license to commit perjury." *Id.*; *Glickstein* v. *United States*, 222 U.S. 139 (1911). As this Court held in *United States* v. *Mandujano*, 425 U.S. 564,

576-577 (1976), immunity supplants the privilege against self-incrimination and "[i]n this constitutional process of securing a witness' testimony, perjury has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are, therefore, imperative. * * * [O]ur cases have consistently —indeed without exception—allowed sanctions for false statements or perjury. . . . Even where a statutory scheme granted blanket immunity from further use of the testimony, the Court has found perjured statements to fall outside the grant."

The facts in this case present a classic example of a defendant who has been granted immunity for his grand jury testimony and at trial intends to testify in a materially inconsistent fashion with the statements given after the immunity grant.

Petitioner contends that a defendant who takes the stand on his own behalf at trial waives his privilege against self-incrimination guaranteed by the Fifth Amendment. *E.g., Doyle* v. *Ohio*, 426 U.S. 610 (1976) (Stevens, J., dissenting at 633); *McGautha* v. *United States*, 402 U.S. 183, 216 (1971); *Harrison* v. *United States*, 392 U.S. 219 (1968); *Brown* v. *United States*, 356 U.S. 148, 155-156 (1958); *Raffel* v. *United States*, 271 U.S. 494 (1926). This waiver is total (*Raffel, supra*) since any voluntary disclosure by the accused is likely to distort the probative picture. The defendant "has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute." *Brown* v. *United States, supra.* The Court in *Brown* concluded,

> It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. '[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.' *Walder* v. *United States,* 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503. The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination. (*Id.*)

Petitioner submits that the only effective sanction for a defendant's perjury under these circumstances is confrontation with his prior inconsistent statements. As noted in *Brown*:

> Striking the witness' testimony, or relying on the trier of fact to take into account the obvious unfairness of allowing the witness to escape cross-examination, must often in practice be poor substitutes for a positive showing under searching cross-examination that the testimony is in fact false. (*Id.* at 156 n 5)

Often a perjury prosecution by itself will not be an effective sanction; the prosecuting attorney should be permitted to conduct a probing, prying and pressing form of inquiry to expose falsehood and evasion to the jury and "to bring the witness back to the mark, to flush out

the whole truth with the tools of adversary examination." *Bronston* v. *United States,* 409 U.S. 352, 359-360 (1973).

The State believes that apposite analogy may be made to *Oregon* v. *Hass,* 420 U.S. 714 (1975); *Harris* v. *New York,* 401 U.S. 222 (1971) and *Walder* v. *United States,* 347 U.S. 62 (1954). In *Harris* the defendant had been interrogated by the police who had failed to advise her of the right to appointed counsel in accordance with *Miranda* v. *Arizona,* 384 U.S. 436 (1966). The prosecution made no effort in its case-in-chief to use the statement, but after defendant testified in her own behalf, used it to impeach her. The Court held that evidence inadmissible against an accused in the prosecution's case-in-chief is not barred for all purposes, provided that it is trustworthy. It reasoned,

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. (citations omitted). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devises of the adversary process. • • •
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. (401 U.S. at 226-227)

It does no violence to the privilege that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence which is damaging to his case. *McGautha* v. *California, supra,* 402 U.S. at 214. The immunity afforded by the constitutional guarantee relates to

the past and does not endow the person who testifies with a license to commit perjury. *Glickstein* v. *United States,* 222 U.S. 139, 142 (1911); see also *United States* v. *Bryan,* 339 U.S. 323, 340-341 (1950).

In a situation which may be compared to this case the defendant in *People* v. *Coleman,* 13 Cal.3d 867, 120 Cal. Rptr. 384, 533 P.2d 1024 (Sup. Ct. 1975) appealed from an order revoking probation, contending that the revocation of his probation in advance of trial on independent criminal charges denied him procedural due process because he was forced to forego his opportunity to testify in his own behalf at his revocation hearing in order to avoid incriminating himself at his pending trial. Recognizing possible tensions between constitutional rights, the California court invoked its supervisory power and ruled that "upon timely objection the testimony of a probationer at a probation revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his probation, and any evidence derived from such testimony, is inadmissible against the probationer during subsequent proceedings on the related criminal charges, save for purposes of impeachment or rebuttal where the probationer's revocation hearing testimony or evidence derived therefrom and his testimony on direct examination are so clearly inconsistent as to warrant the trial court's admission of the revocation hearing testimony or its fruits in order to reveal to the trier of fact the probability that the probationer has committed perjury at either the trial or the revocation hearing." (120 Cal.Rptr. at 402). The California court explained that no purpose would be served by precluding use of that testimony or its fruits to impeach or rebut clearly inconsistent testimony which the probationer volunteers at his trial:

The intent of our exclusionary rule regarding probation revocation hearing testimony is to encourage the fullest possible truthful disclosure of relevant facts and circumstances at the revocation hearing by allowing a probationer who does testify at his revocation hearing nonetheless to enjoy unimpaired the full protection of the privilege against self-incrimination at his subsequent trial. This privilege requires the prosecution to prove a defendant's guilt through evidence accumulated through its investigative efforts and not extorted from the defendant himself. While the privilege against self-incrimination does assure an accused of the right to remain silent at his trial, it does not—at least under modern principles of Anglo-Saxon jurisprudence (*cf. United States* v. *Grunewald* (2d Cir. 1956) 233 F.2d 556, 587-592 (appendix to dissenting opinion of Frank, J.), revd. (1957) 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931)—encompass a right of an accused to lie in his own behalf at trial. (See *People* v. *Barnes* (1966) 240 Cal.App.2d 428, 430-433, 49 Cal.Rptr. 470).

Cf. United States v. *Kahan,* 415 U.S. 239 (1974).

In *United States* v. *Tramunti,* 500 F.2d 1334 (2d Cir. 1974), the defendant was prosecuted for perjury committed when he testified as a witness on his own behalf at a previous trial for conspiracy, mail and stock fraud. On cross-examination the Government sought to impeach Tramunti's testimony with a transcript of his testimony before a grand jury under grant of use immunity. On appeal the Circuit Court explained that the theory of immunity statutes is that in return for the surrender of the Fifth Amendment right, the witness is promised that he will not be prosecuted based on the inculpatory evidence

he gives in exchange. The bargain struck is conditional, however, upon the witness who is under oath telling the truth. According to the court,

> If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to protect. Thus, the agreement is breeched and the testimony falls outside the constitutional privilege. Moreover, by perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his past indiscretions. (*Id.* at 1342)

The court concluded that immunity does not extend *in futuro* to another crime not existing when the immunity was offered. It also rejected Tramunti's contention that the immunity statute should not be interpreted to permit the use of the testimony in other criminal trials not based on the original perjurious statements. Noting that there was square authority that the listing of exceptions in the immunity statutes for subsequent criminal prosecutions is not intended to be an exclusive enumeration, the court held that "[t]he failure to include in the exceptions to the statute the use of false testimony to attack credibility or demonstrate the commission of prior similar acts does not prevent such use." (500 F.2d at 1345)

In accord with *Tramunti* is *United States* v. *Moss,* 562 F.2d 155 (2d Cir. 1977), U.S. *cert.* filed Nov. 8, 1977 (No. 77-661, 22 Cr.L. 4112). At issue in *Moss* was whether testimony given under the use immunity provision of the Bankruptcy Act may be used for impeachment purposes at a subsequent trial for the substantive offense of bankruptcy fraud if the defendant takes the stand and no

objection to such use was raised. Relying on *Harris* v. *New York, supra* and *Walder* v. *United States, supra,* the prosecution contended that the immunized testimony could be used for impeachment on cross-examination even though it could not have been used as direct evidence. The court observed that the immunity grant does not protect perjury committed before trial under "immunity" any more than exclusionary rules protect perjury committed at trial. Since the appellant conceded that significant parts of this immunized testimony were perjured, the court held that the use immunity had been dissipated so far as the testimony was willfully false, and the acknowledgment by the defendant that it was perjurious rendered it usable at the trial on both the substantive offense and for perjury. In *dicta,* however, the court in *Moss* rejected the Government's contention that the *Harris-Walder* line sanctions a general use of immunized testimony for impeachment purposes. The court opined that only where perjury is committed does the exception prevail, citing *United States* v. *Hockenberry,* 474 F.2d 247 (3rd Cir. 1973) for the proposition that even in a trial for having made false declarations before a Grand Jury, the use of truthful immunized statements on cross-examination is not sanctioned. (562 F.2d at 165). Significantly, the prosecution in *Moss* was not for perjury, in which the jury determines whether the immunized testimony was perjurious directly by its verdict. On the substantive offense the perjury was collateral and not directly decided by the jury. The *Moss* court opined that to find in such a prosecution that particular immunized testimony was perjurious requires some preliminary finding of fact, or clear documentary evidence as in *United States* v. *Kahan, supra,* 415 U.S. 239, or as in both *Moss* and *Tramunti,* later objective proof. It left unresolved whether in the normal case a trial judge can resolve in advance, without conducting a mini-trial, that the immunized testimony was willfully false. (562 F.2d at 165).

Both respondent and the Appellate Division relied on *United States* v. *Hockenberry, supra* as authority precluding the use of immunized testimony for impeachment purposes. In *Hockenberry* the defendant, a former county detective, was charged with falsely testifying before the grand jury after receiving immunity. Hockenberry took the stand in his own defense and denied knowledge of or connection with bribes or payoffs to county detectives by persons engaged in unlawful gambling and prostitution. On cross-examination the Government impeached him with other truthful immunized grand jury admissions that he had falsely asserted personal knowledge of facts in search warrant applications. The issue was whether the trial court erred in permitting use for impeachment purposes of such immunized testimony which was not material to the crime at issue. The court held that "the immunity statute properly permits prosecution for perjury committed in an otherwise immunized statement and also the introduction in evidence of so much of the statement as is essential to establish the *corpus delecti.*" (*Id.* at 249). It rejected, however, the Government's contention that it could use any truthful admission of wrongdoing made in an immunized statement to discredit the witness, since such an interpretation of the immunity statute would "jeopardize its adequacy as a constitutional means of requiring self-incrimination." (*Id.* at 250).

The court in *Hockenberry* gave short shrift to the Government's reliance on *Harris* v. *New York, supra,* and was unable to appreciate the difference between adverse use of the inconsistency on the Government's direct case to prove a *prima facie* case and its more limited reception for impeachment purposes in response to the defendant's

false testimony. It premised its opinion on the generality that immunity must be coextensive with the privilege, but failed to recognize the important caveat that the privilege does not protect perjury *in futuro*, another crime that did not exist when immunity was granted. Furthermore, it did not anticipate the situations in *Tramunti* and *Moss*, where the defendants' grand jury testimony was also false. Rather, it was primarily concerned with the use of non-material immunized testimony containing a truthful admission of wrongdoing. Petitioner submits that Hockenberry is factually and legally distinguishable from the complex situation presented by this case and that these differences significantly effect the constitutional issues presented. Moreover, it is submitted that *Hockenberry* enunciates a more stringent standard than is required by the Constitution, and it need not be extended to the states.

When Portash testified on November 14, 1974, before the State Grand Jury after grant of immunity, his testimony was restricted for the most part to admission that the documents he had submitted under subpoena had been fabricated by him after the State Police began investigating him in 1972 (3TGJ4-5 to 15-3). Portash subsequently repeated these admissions and gave more damaging statements in conjunction with the "charge bargaining" discussions in anticipation of his cooperation in the Schmertz trial. It was uncontested before the trial court and the State Supreme Court that these latter statements were not immunized. Since respondent revealed this information he lost the privilege. *Garner* v. *United States, supra,* 424 U.S. at 653. As noted in petitioner's brief to the Supreme Court of New Jersey (n. at p. 16), the State in its case-in-chief introduced independent evidence of the fabricated documents which was the central focus of defendant's immunized State Grand Jury testimony. It

would have been futile and unlikely for defendant to recant that testimony at trial, and it was not realistically anticipated by the State. Rather, respondent revealed the underlying cause for his motions in his Appellate Division brief (at p. IV): both he and the State (See, *e.g.,* 2TH31-21) were primarily concerned with the use of the more damaging nonimmunized statements taken subsequently to the grand jury testimony, including the statement of February 5, 1975. In that statement Portash admitted that he had first learned that Schmertz had an interest in Madison Agency about two weeks after he accepted the offer of employment (TS3-16 to 20). Even this admission may have understated his knowledge and thus may have been false. In his appellate brief Portash acknowledged his intention to contradict this prior statement by testifying at trial that "he had no knowledge of any connection between Leisure Technology and the Madison Agency at the time of his employment and indeed never learned of the fact that Schmertz [*sic*—Safran] had an equal but silent partner during his employment."

It is evident that when respondent asserted his premature claim before the trial court, it was faced with a much more difficult question than that left open in *United States* v. *Moss, supra.* There were a number of pretrial statements involved, not all of which were immunized. The trial judge had deferred its ruling and stated that it would handle the matter after respondent's direct testimony, on a question-by-question basis, requiring the questions related to the grand jury testimony to be first posed at side bar (10T112-18 to 113-2). The trial court intended to make preliminary findings of relevancy, materiality and to weigh its probative value against potential prejudice (10T112-18 to 113-12). This ruling does not contravene the procedure discussed in *Moss.* Petitioner advocates that it was permissible to utilize the immunized

testimony if respondent had testified in an inconsistent fashion. However, even if petitioner was limited to utilizaing false immunized testimony, a hearing on its admissibility did not have to be held until respondent took the stand on his own behalf. To mandate any other procedure would convert the shield of the privilege against self-incrimination which protects the liberty of individual citizens into a sword to destroy the integrity of the judicial system.

CONCLUSION

For these reasons, a w of certiorari should issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

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Of Counsel and on the Petition

APPENDIX

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—June 29, 1977)

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH S. PORTASH,

Defendant-Appellant.

A-2848-75

Argued May 23, 1977—Decided Jun 29 1977

Before Judges Bischoff, Morgan and King.

On appeal from Superior Court, Law Division, Ocean County.

Mr. Michael E. Wilbert argued the cause for appellant (Messrs. Wilbert, Clyne & Montenegro, attorneys).

Mr. Benjamin D. Leibowitz, Deputy Attorney General, argued the cause for respondent (Mr. William F. Hyland, Attorney General of New Jersey, attorney).

Opinion of the Superior Court of New Jersey, Appellate Division

The opinion of the court was delivered by

MORGAN, J.A.D.

In this appeal from his conviction of statutory extortion (N.J.S.A. 2A:105-1) defendant challenges a trial court ruling permitting State use of defendant's granted jury testimony, compelled under a grant of immunity, as a means of impeaching the credibility of his trial testimony. In reliance upon this ruling defendant declined to testify in his own behalf. We reverse.

According to the State's theory of the case which the jury apparently accepted, defendant Joseph S. Portash, while a member of the Ocean County Board of Freeholders, a member of the Manchester Township Committee and a member of the Manchester Municipal Utilities Authority, accepted approximately $31,730 from one Donald Safran, trading as the Madison Agency, Inc. (Agency), a real estate and insurance company in Ocean County. Although this money was supposed to have been given in payment for services rendered by defendant, the evidence adduced suggested that no such services were performed and that, in fact, the Agency was covertly acting as a mere conduit for transmission of the money from another company, Leisure Technology Corporation (Leisure), a major real estate developer in Ocean County, which received favorable treatment by the public bodies on which defendant served.

Because disposition of this appeal turns on the permitted use of defendant's compelled and immunized grand jury testimony, it is unnecessary for us to recount in detail the considerable testimony adduced during the 16-day jury trial which, in our view, and contrary to defend-

Opinion of the Superior Court of New Jersey, Appellate Division

ant's contentions, adequately supports the jury's verdict of defendant's guilt. The facts surrounding the immunity granted defendant are, however, brief and undisputed.

On November 6, 1974 defendant appeared, with counsel, before a State Grand Jury investigating Robert Schmertz, Leisure's president, and Safran, Agency's principal, in response to a subpoena served upon him on October 29, 1974, and expressed his intention of claiming the Fifth Amendment privilege against self-incrimination. Subpoenaed again for November 14, 1974, defendant was granted immunity in the following terms:

> We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury. No representations have been made insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury, a separate Grand Jury from the one Mr. Portash is about to appear before.

Defendant was asked whether he understood the purport of this agreement.

> Mr. Luciani: Mr. Portash, do you understand—have you discussed this matter with your attorney?
>
> Mr. Portash: I believe so.
>
> Mr. Luciani: And you understand the fact that nothing you are about to testify to can be used against you, personally, in any subsequent criminal prosecution?

Mr. Portash: To the best of my knowledge of legal matters, yes.

Following statement of this agreement, defendant testified. Thereafter continued negotiations between defendant's counsel and the State ensued with the objective of terminating defendant's exposure to prosecution in return for his restitution of the monies received and resignation from office. No agreement was reached in this regard and defendant was thereafter indicted on information derived from sources unconnected with his grand jury testimony. Defendant does not challenge the indictment underlying this case as being derived even indirectly from his compelled grand jury testimony.

After completion of the State's case, defendant sought a ruling from the trial court as to whether the State would be permitted to use his grand jury testimony in cross-examination in the event he chose to testify in his own behalf. Following extended argument, the trial court ruled that if defendant testified and were asked a question on either direct or cross-examination which elicited a response materially inconsistent with his prior testimony before the grand jury and relevant to the issues at trial, then the State would be permitted to refer to that portion of the grand jury testimony in its cross-examination. It was in reliance upon this ruling that defendant declined to testify on his own behalf.

The statutory authority for the State's grant of immunity to defendant, N.J.S.A. 2A:81-17.2a2, reads as follows:

> If any public employee, having claimed the privilege against self-incrimination, testifies before any court, grand jury or the State Commission of Investigation after having been informed that his failure to appear and testify would subject him to removal from his office, position or employment, such testimony and the evidence derived therefore shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury or false swearing committed while so testifying.

Clearly, the grant of immunity appearing on the record of the grand jury proceedings at which defendant testified was in strict accordance with this statutory authority and resulted in precluding use of the compelled testimony or evidence derived therefrom in any subsequent criminal proceeding against defendant.

The State contends that a grant of use immunity pursuant to N.J.S.A. 2A:81-17.2a2 only precludes use of the compelled testimony as part of the State's affirmative case against the witness; not precluded is its use for impeaching the credibility of the witness, later a defendant, who testifies at variance therewith. To hold otherwise would, in the State's view, confer a license to commit perjury. We disagree with the State's definition of the scope of protection afforded by use immunity and the consequences feared from rejection of its position.

A valid claim of the Fifth Amendment privilege against self-incrimination made before a grand jury will, of course, be honored and the witness claiming it cannot be required to testify. Because of the imperatives of investigation, however, the device of immunizing such testimony from

later use against the witness in a subsequent criminal proceeding was fashioned as a means of compelling such otherwise privileged testimony without compromising the integrity of the constitutional protection afforded by the Fifth Amendment and cognate state constitutional guarantees. The immunity device, however, will only be deemed a sufficient answer to a claim of privilege if the scope of immunity afforded is commensurate in all respects with the privilege against self-incrimination which it replaces. *United States* v. *Calandra,* 414 U.S. 338, 346 (1974); *Kastigar* v. *United States,* 406 U.S. 441, 459 (1972). In order for a grant of immunity to pass constitutional muster as an adequate substitute for the self-incrimination privilege, it must leave the witness whose testimony has been compelled and the prosecutorial authorities "in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Kastigar* v. *United States, supra* at 462.

The essential inquiry here, therefore, is whether the proposed use of the immunized grand jury testimony to impeach defendant's trial testimony would leave defendant and the State in the position each would have occupied had defendant's claim of privilege been honored. That inquiry can only be answered in the negative. Had defendant been permitted to refuse testimony before the grand jury on his claim of privilege, the present argument by the State could not even have been made: no testimony to be used for impeachment purposes would have existed. Had defendant's testimony not been compelled, he would have been able to testify at his trial free from the fear engendered by the possible use of prior inconsistent testimony for purposes of impeachment. It necessarily follows

that if the grant of immunity is to be viewed as commensurate with the lost privilege against self-incrimination, then he should be accorded the same freedom to testify in his own behalf at trial as he would have enjoyed had he been permitted to remain silent before the grand jury.

A similar issue was considered and disposed of in *United States* v. *Hockenberry,* 474 F. 2d 247 (3 Cir. 1973). In *Hockenberry,* the prosecution used immunized grand jury testimony given by Hockenberry to impeach his credibility at his trial on a charge of some other wrongdoing. The conviction was reversed on the ground that the immunized testimony could not be so used without jeopardizing the adequacy of the immunity as a constitutional means of compelling self-incriminatory testimony. The court in *Hockenberry* observed in terms pertinent to the present matter:

> But for the grant of immunity Hockenberry would have been privileged to refuse to admit to the grand jury his wrongdoing in the execution of affidavits to obtain search warrants. And if immunity that deprived him of that privilege is to be, as constitutionally it must, co-extensive with the privilege itself, his compelled admission of wrongdoing cannot later be used to discredit his effort to defend himself against a charge of some other wrongdoing. [*Id.* at 250].

In this case, unlike *Hockenberry,* the immunized testimony was sought to be used to discredit defendant's effort to defend himself with respect to the very matters about which his testimony was compelled. The argument for excluding such testimony is, therefore, even more compelling in this case than it was in *Hockenberry.*

The State's reliance upon *Harris* v. *New York*, 401 U.S. 222 (1971), and its progeny as an analogy to the issue under consideration is inappropriate. *Harris* held that defendant's voluntary incriminating statement, although inadmissible as part of the State's case in chief because obtained without *Miranda* warnings having been given, can be used to test defendant's credibility if he chooses to testify in his own behalf at the trial. The difference between the *Harris*-type case and the present case is obvious. In *Harris*-type situations the statement sought to be used for impeachment has been voluntarily given; in the present case the testimony was judicially compelled under a promise of immunity the State now wishes to modify after the testimony has been given. In *Harris*, the statement was not made in reliance upon warnings never given; here, the testimony was compelled upon the State's promise that the testimony judicially coerced would not be used "in any respect." *Kastigar* v. *United States*, *supra* at 453. The question is whether the State should be required to honor its promise, expressed in its statute and explicated in leading cases defining the required scope of immunity, not to use the testimony compelled in any subsequent criminal proceeding against the defendant, except in circumstances not here pertinent.[1] In our view, the *quid pro quo* for depriving defendant of his self-incrimination privilege should be exacted and the trial court erroneously ruled otherwise.

We agree with the State that forbidding use of immunized testimony for impeachment purposes impedes disclosure of truth. No one, however, has ever claimed for the privilege against self-incrimination the effect of revealing truth; its substitute, use immunity, has of course the same effect. Clearly invocation of a valid claim of privilege results in a partial suppression of facts relevant to a given issue and to that extent results in obscuring the truth of the matter. It is, however, in the "fundamental values and most noble aspirations" which underlie that zealously safeguarded Fifth Amendment privilege (and the immunity which stands in its place) that the courts have discerned the fully justifiable basis for partially sacrificing the truth-seeking quest which is the essential business of a criminal trial. See *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). Indeed, all privileges suppress truth in the service of other equally regarded values.

[1] i.e. in a charge for perjury or false swearing in giving the compelled testimony.

The State further contends that precluding use of immunized testimony for impeachment purposes "would leave the State without any remedy against defendant's trial perjury." Without commenting upon the overstatement inherent in this contention, we can concede that this statement is substantially so. It would have been equally so, however, had the State declined to compel defendant to give testimony under a promise of immunity. Had defendant been permitted his silence before the grand jury, the testimony which the State sought to use for impeachment purposes would not even exist and the State would have been just as disabled from testing defendant's credibility as it is when it is precluded from using the testimony it chose to compel. Clearly, in the very statement of its position, the State is seeking benefit from the immunized testimony it would not have enjoyed had defendant been permitted to remain silent as he was privileged to do.

Indeed, immunized testimony cannot be used as evidence of perjury or false swearing in giving nonimmunized testimony. *State* v. *Williams*, 59 N. J. 493, 500 (1971). Hence, a breach of immunity will not be countenanced even as a prophylactic measure designed to prevent perjury or to insure the giving of truthful testimony, the specific purpose for which the State intended to use the testimony in the present case.

Although we agree with the State's assertion that a deliberately false statement debases the judicial process, so does the State's failure or refusal to honor its voluntary commitments. The State was free to act as it chose; it was under no compulsion to grant immunity. Defendant, however, enjoyed no such freedom. Once the State granted immunity, his privilege against self-incrimination was gone, only because the immunity granted was supposed to have been commensurate in its protection with the lost privilege. To accept the State's position, in our view, would constitutionally impair the privilege and render suspect the immunity which must by constitutional command afford precisely the same degree of protection.

Defendant sought the trial court ruling under consideration as a basis upon which to decide whether to testify in his own behalf. In reliance thereon, and fearful of the use to which the grand jury testimony would be put, he decided against testifying. The jury, therefore, decided the case on the basis of partial evidence. We have no doubt the erroneous ruling of the trial court requires reversal of the conviction and a new trial for defendant.

Because of our ruling, it is unnecessary for us to consider the many other claims of error asserted by defendant. The conviction is reversed and the matter remanded to the trial court for a new trial.

Notice of Petition for Certification

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION—DOCKET NO. A-2848-75

Criminal Action

(Filed—July 20, 1977)

STATE OF NEW JERSEY,

Plaintiff-Petitioner,

v.

JOSEPH S. PORTASH,

Defendant-Respondent.

To: Michael E. Wilbert, Esq.
Wilbert, Clyne & Montenegro
254 Brick Blvd.
Brick Town, New Jersey 08723

PLEASE TAKE NOTICE that the State of New Jersey petitions the Supreme Court of New Jersey for certification to the Superior Court, Appellate Division from its judgment by the Honorables William G. Bischoff, P.J.A.D., Sonia Morgan and Michael P. King, J.J.A.D., entered on June 29, 1977, which reversed defendant's conviction of

Notice of Petition for Certification

statutory extortion (N.J.S.A. 2A:105-1) by the Honorable William E. O'Connor, J.S.C. and a jury and remanded to the trial court for new trial.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Plaintiff-Petitioner
By: RICHARD W. BERG
Deputy Attorney General

Dated: July 18, 1977

Notice of Appeal to the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

APPELLATE DIVISION—DOCKET NO. A-2848-75

Criminal Action

(Filed—July 20, 1977)

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

JOSEPH S. PORTASH,

Defendant-Respondent.

To: Michael E. Wilbert, Esq.
Wilbert, Clyne & Montenegro
254 Brick Blvd.
Brick Town, New Jersey 08723

PLEASE TAKE NOTICE that the State of New Jersey appeals to the Supreme Court of New Jersey pursuant to R. 2:2-1(a)(1) from the judgment of the Superior Court, Appellate Division by the Honorables William G. Bischoff, P.J.A.D., Sonia Morgan and Michael P. King, J.J.A.D.,

Notice of Appeal to the Supreme Court of New Jersey

entered on June 29, 1977, which reversed defendant's conviction of statutory extortion (N.J.S.A. 2A:105-1) by the Honorable William E. O'Connor, J.S.C. and a jury and remanded to the trial court for new trial.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Plaintiff-Appellant
By: RICHARD W. BERG
Deputy Attorney General

Dated: July 18, 1977

Order of the Supreme Court of New Jersey Denying Certification

SUPREME COURT OF NEW JERSEY

C-204—SEPTEMBER TERM 1977

(Filed—January 17, 1978)

STATE OF NEW JERSEY,
Plaintiff-Petitioner,

v.

JOSEPH S. PORTASH,
Defendant-Respondent.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied.

WITNESS, the Honorable Mark A. Sullivan, Presiding Justice, at Trenton, this 17th day of January, 1978.

STEPHEN W. TOUNSEND
Acting Clerk

Order of the Supreme Court of New Jersey Dismissing Appeal

SUPREME COURT OF NEW JERSEY

13,994—September Term 1977

(Filed—January 17, 1978)

State of New Jersey,

Plaintiff-Appellant,

v.

Joseph S. Portash,

Defendant-Respondent.

This matter having been duly presented to the Court, it is Ordered that the appeal is dismissed pursuant to Rule 2:12-9.

Witness, the Honorable Mark S. Sullivan, Presiding Justice, at Trenton, this 17th day of January, 1978.

Stephen W. Tounsend
Acting Clerk

Judgment of the Ocean County Court, Law Division

COUNTY COURT OF OCEAN COUNTY

Law Division

(Criminal)

(Filed—April 24, 1975)

State of New Jersey,

v.

Joseph S. Portash,

No. SGJ # 27-75-10

Indictment for

Misconduct in Office
NJS 2A:85-1 Count 1

Accusation for

Unlawful Takings
NJS 2A:105-1 Count 2

Filed 4/24/75 Received in Ocean County 7/30/75
(Change of Venue from Mercer County)

Judgment of the Ocean County Court, Law Division

Arraignment 4/25/75 Mercer County

Plea of Not Guilty—4/25/75

Trial 1/19/76; 1/20/76; 1/21/76; 1/22/76; 1/23/76; 1/26/76; 1/27/76; 1/28/76; 1/29/76; 2/3/76; 2/4/76; 2/5/76; 2/6/76; 2/9/76; 2/10/76; 2/11/76;

Verdict of Not Guilty to count 1 Guilty to count 2 2/11/76 Jury polled. Unanimous. Bail cont'd.

Sentence of Court imposed on 3/12/76; as follows:

The Court sentenced the Defendant to (6) months in the Ocean County Jail, suspended the sentence and placed the Defendant on (1) year probation (non-reporting). The Court fined the Defendant $1,000.00 which shall be paid during the probation period.

Reason for Sentence: The Court is confronted with a tragic situation. Young man found guilty of a violation which does not require that he be aware that the offense was a crime. Accordingly, does not require rehabilitation. He has suffered punishment through the entire process of being placed on trial. Deterrence factor remains to be disposed of.

WILLIAM E. O'CONNOR, JR.
Judge

Supreme Court, U. S.
FILED
AUG 15 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1489

STATE OF NEW JERSEY,

Petitioner,

—*v.*—

JOSEPH S. PORTASH,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT
OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR CERTIORARI FILED ON APRIL 14, 1978

CERTIORARI GRANTED JUNE 12, 1978

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APPENDIX

1. List of Relevant Docket Entries.

a. State Grand Jury subpoena of defendant Portash's employment record's on October 29, 1974.

b. Defendant Portash's objection to subpoena overruled by the Honorable George Y. Schoch, A.J.S.C., at *in camera* hearing in the Superior Court of New Jersey, Law Division, Mercer County on November 6, 1974.

c. State Grand Jury subpoena for defendant Portash's testimony and grant of immunity on November 14, 1974.

d. State Grand Jury indictment filed on April 24, 1975.

e. Jury trial from January 21, 1976 to February 11, 1976 before the Honorable William E. O'Connor, Jr., J.S.C. in the Superior Court of New Jersey, Criminal Division, Ocean County, resulting in conviction for extortion and acquittal of misconduct in office.

f. Entry of Judgment and imposition of sentence by Judge O'Connor on March 12, 1976 to a suspended sentence to six months confinement, with a fine of $1,000 and one year of probation.

g. Filing of Notice of Appeal to the Superior Court, Appellate Division on April 26, 1976.

h. Judgment reversing conviction and remanding for retrial by Appellate Division on June 29, 1977.

i. Denial of Petition for Certification and Dismissal of Appeal on January 17, 1978 by Supreme Court of New Jersey.

2. The following pleadings, judgments, opinions and orders are printed in the Appendix to the Petition for Certiorari.

Opinion of the Superior Court of New Jersey, Appellate Division 1a

Notice of Petition for Certification 11a

Notice of Appeal to the Supreme Court of New Jersey 13a

Order of the Supreme Court of New Jersey, Denying Certification 15a

Order of the Supreme Court of New Jersey, Dismissing Appeal 16a

Judgment of the Ocean County Court, Law Division 17a

3. Other Relevant Parts of the Record—Transcripts.

(1) *In camera* hearing, Wednesday, November 6, 1974

(2) State Grand Jury hearing November 6, 1974

(3) *In camera* hearing, November 14, 1974

(4) State Grand Jury hearing, November 14, 1974

(5) Statement of Joseph Portash, February 5, 1975

(6) *In camera* hearing, December 15, 1975

(7) Trial, Vol. X, February 5, 1976, pp. 50-133

(8) Trial, Vol. XII, February 9, 1976, pp. 11-15, 49-97

In Camera Hearing of November 6, 1974

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION

THE STATE OF NEW JERSEY,

—v—

JOSEPH S. PORTASH,

Defendant.

Before:

HONORABLE GEORGE Y. SCHOCH, A.J.S.C.

Appearances:

WILLIAM F. HYLAND, ESQ.,
Attorney General for the,
State of New Jersey,
By: ALFRED J. LUCIANI, ESQ.,
Deputy Attorney General.

JAMES T. DOWD, ESQ.,
Attorney for Defendant.

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(2)* The Court: Who is the gentleman in the back?

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* Figures in parentheses refer to each new page of the stenographic transcript.

Mr. Dowd: Your Honor, he's a friend of—my name is James T. Dowd, your Honor. I represent Mr. Joseph Portash, the subject of this Hearing. This gentleman is a friend of his, and he, if we have no objection to his being present—

Mr. Luciani: I have no objection, your Honor.

The Court: All right.

All right. Let the record show that this is an In Camera Hearing. All right. Mr. Luciani?

Mr. Luciani: Your Honor, the State, through me, would like to make application for enforcement of a subpoena to Mr. Portash, Subpoena Duces Tecum issued by the State Grand Jury and served upon Mr. Portash on October 29 at his home in Lakehurst. This subpoena requires production of certain documents prepared, some of them prepared during the course of his employment with the Given Real Estate Insurance Firm, others pertaining to transactions with that firm, and the remainder dealing with his income tax returns.

Mr. Portash is a target of the investigation, however, we feel that the request we've made in this subpoena, do not fall within the Fifth Amendment privilege and, therefore, even though a target would still be subject to production requirements under (3) that subpoena, and specifically we refer first of all to the memoranda requested and prepared pursuant to his employment contract with the Madison Agency and/or Donald Saffron, Incorporated. These memoranda are allegedly site evaluations. We have not seen them, but they were prepared and communicated by Mr. Portash, evidently, to the administrator of the Madison Agency and Donald Saffron, Incorporated, that is Donald Saffron, and used during the course of the normal business transactions, and possibly

even communicated to other persons, clients of the agency. Therefore, we think at this point in time, based upon what we know that these are not private papers, but are papers that were prepared pursuant to an employment contract and given by Mr. Portash pursuant to that contract to incorporation.

In addition, the—

The Court: Has there been a refusal to produce any of these documents?

Mr. Luciani: Mr. Dowd represented to us that Mr. Portash would decline to produce the documents, or to offer any testimony in connection thereto.

The Court: All right. Mr. Dowd, what's your position on this?

Mr. Dowd: May it please the Court, your Honor, (4) I would like to state for the record, and I don't think there's any disagreement on the facts, and if there is so, the Deputy Attorney General may interpose an objection, Joseph Portash, the gentleman who is presently in Court, your Honor, who has been served the subpoena that is before you for the review is an elected official of Manchester Township in Ocean County, New Jersey. He is presently, your Honor, a Freeholder of Ocean County, New Jersey. His term will expire December 31, of this year. The subpoena served on him, your Honor, we have taken the position by way of a stipulation for the purposes of being before your Honor that he would refuse to tender the documents on the basis that they are priviledged because they will incriminate him, possible criminal indictment. Firstly, your Honor, I'd like to say before getting into that, that as the Deputy Attorney General has stated, Mr. Portash is a target, a specific target of an investigation being conducted by Statewide Grand

Jury under the Deputy Attorney General's direction, and I feel, your Honor that because he is a target, his appearance and subpoenaed before that same body, will so pollute the pure well springs of human objectivity in the minds of the 23 or the quorum members of the Grand Jury who are sitting there. (5) I feel that it subjects him to a great degree of prejudice, should an indictment be returned by 12 or more of those persons.

Secondly, your Honor, I feel that the matters are definitely potentially incriminating to Mr. Portash as his attorney, and as an officer of this Court I represent to you for my dialogue discussion of confidentiality with Mr. Portash that he would expose himself to incriminating evidence that could be used against him, or the fruits of that poisonous tree sought out and used against him. Therefore, we respectfully submit that we will not tender the documents over to the Grand Jury pursuant to this subpoena because of their incriminatory nature.

The Court: Mr. Luciani?

Mr. Luciani: Yes, your Honor. As to the first aspect of it, I'm prepared to represent to the Court that the testimony taken could be taken before a different Grand Jury so that there wouldn't be any possibility of pollution because of the identification of these records, but the more vital question is not, whether or not the document are going to be self-incriminating. Really the question boils down to whether or not they're subject to privilege because as, as we all know there are certain documents, for example documents required to be kept by law, corporate records, situations where privilege has been waived, where privilege no longer obtains. And if privilege no longer obtains, or never existed at that, there can be no withholding on the grounds of self-

incrimination. It simply isn't any privilege to withhold that type of material, and that's what I think we have here. This is material that was intentionally prepared pursuant to an employment contract.

The Court: Well, you're talking about Federal Income Tax Returns. What's that got to do with an income employment contract?

Mr. Luciani: Well, we're talking about—the Federal Income Tax Return are a separate consideration. We feel that they are not privileged in the Fifth Amendment sense because they're required to be filed by law, and that takes them out of the privilege. The expense check, not the expense, the expense vouchers, the record of expenses are again supposedly, I would think, prepared pursuant to employment so that his employment obligations could be fulfilled, and he can be reimbursed.

And most important, the most important element on that subpoena, however, and not the bank records (7) again that's a separate question, but the most important element on the subpoena are the materials prepared pursuant to his employment contract. And, you know, again as I said, it seems to me that if no privilege exists, or is waived by communication to third parties, then the State Grand Jury is entitled to have those materials, consider those materials, irrespective of the fact that they may be incriminating.

The Court: You have any authority for that position, Mr. Luciani?

Mr. Luciani: Well, your Honor, it seems to me, again we didn't have a great opportunity to research this particular question because it wasn't until this morning that we found out that Mr. Portash had no intention of producing these documents, but once materials—

The Court: What's the—

Mr. Luciani: The privilege—

The Court: What's the Federal case that, that the accountant—

Mr. Luciani: The recent case, the work papers?

The Court: Well, depends on what you mean by recent. I thought there was a Federal case in the last couple of years where some woman was being (8) investigated and the jury, Grand Jury attempted to get the material from her, and it's my recollection the Court said she didn't have to turn it over.

Mr. Luciani: That's right.

The Court: But then her accountant did.

Mr. Luciani: That's right.

The Court: But doesn't the same thing apply here? This is a—you're asking this man to incriminate himself—

Mr. Luciani: Well, no.

The Court: —in fact, by turning over papers that—

Mr. Luciani: Okay, I think—

The Court: —that are within his possession?

Mr. Luciani: I think it's different in this respect, your Honor, in a situation where you're dealing with the accountant, you're dealing with a man's private papers and you're giving them in confidence to another individual, in confidence, and that's the key. You give him the papers so he can do a service for you as the individual. Here it wasn't like that at all. He was performing his designated task pursuant to an employment contract. He was giving them voluntarily, and not for his use, not for use by the corporation, for his benefit, but (9) by use by the corporation for someone else's benefit, for their client's benefit, knowing full well that the, that the contents of those probably would be revealed to third parties. I consider that, and I believe it to be a waiver, and I think it takes out of the Fifth Amendment privilege. They are not private papers. They're not papers prepared intending that they not be communicated to third parties, quite the contrary. They were prepared so that they would be communicated, and I think that—

The Court: What about that, Mr. Dowd? What about these, the middle part of this list of records that they want? I don't have much trouble with the income tax returns, or the bank statements; they seem like private papers to me. But what about these records?

Mr. Dowd: May it please the Court, your Honor, this is always a very difficult thing to argue, this whole theory because one says why are you not willing to produce these, and the issue, and the issue then about how much can I reveal without incriminating myself in Court. But to answer your question, your Honor, the papers that they have asked for are the private papers of Mr. Portash. They have not asked for him to produce documents of a corporation.

(10) Now, the Deputy Attorney General indicates that what Mr. Portash has in relation to that very sentence, your Honor, are similar to, or exactly that of what they could have gotten from the employer. If they could get it from the employer, your Honor, I would like to direct a rhetorical question, why don't they subpoena them from the third party, the employer?

Now, if there's a reason they have not done that, your Honor, they have deliberately, and purposely sought to have Mr. Portash come down himself and produce this evidence, that in the scope of their examination and investigation could incriminate him personally, then I think that they have no right to do that. The question becomes,

Judge, and this is why I cannot answer you as candidly as I'd like to, I don't mean candid, as knowledgeably, I don't know the entire panoramic scope of the investigation. I have, I am not privy to what the State is actually after. I am highly suspicious or perceptive of what I think they're trying to do. I think they're endeavoring to find evidence, if they have not already gotten it, sufficient to have probable cause to indict Mr. Portash and others for such type of impropriety in getting payments, I assume an allegation of illegal payments through those named (11) employers. I assume this is, I'm just trying to figure what are they after in the indictable potential of my client, and if that's what they're after, your Honor to indict him, I don't mean they're after to indict him, indict him on facts that would justify such an indictment, then I think it's highly improper that Mr. Portash should produce documents in relation to that employment in the center of that subpoena, your Honor, that the State may use or use from the investigatory fruits of those documents, information that could get the gentleman indicted. If it's simply work records, subpoena them from the corporations mentioned therein, Judge. They're not doing that, or if they have done that, I don't know that, Judge.

The Court: Well, could be they've been destroyed, but it doesn't really matter whether they're available through some other source. The question is whether or not Mr. Portash should be obligated to produce them regardless of whether they could be gotten some place else.

Mr. Luciani: Your Honor, may I—

The Court: Well, if—

Mr. Luciani: I'm sorry.

The Court: If he was directed to produce these (12) documents, after he has been advised that he is a target

of the investigation, wouldn't he then be in a position if the indictment, if an indictment is returned against him, based on the production of these documents, wouldn't he be in a position to move to quash that indictment because they're using the fruits of this investigation with him as a target?

Mr. Dowd: I respectfully submit, your Honor, that I think it would be a plenary immunity granted to him if he's forced to submit these documents. I'm, that's my legal conclusion, your Honor.

The Court: Wouldn't that be the effect?

Mr. Luciani: Your Honor, it would only be an immunity of any sort, if in fact these documents were privileged. If our understanding of what these documents purport to be, if it's true, it's as our understanding is that these are site evaluations, I fail to see how they can be incriminating. Now, despite the fact that Mr. Dowd—

The Court: Excuse, me a moment. I don't understand what you mean, site evaluations?

Mr. Luciani: Well—

The Court: Is it s-i-t-e you're talking about, or s-i-g-h-t?

Mr. Luciani: S-i-t-e, your Honor. And in (13) effect what I undertand these documents to be, are an evaluation made by Mr. Portash pursuant to an employment contract with Madison Agency and Donald Saffron, Incorporated judging the property of, judging its suitability for a given purpose.

Now, I fail to see, given the scope of our investigation, given the subject matter of our investigation, how these things could be incriminating, if in fact they are what they are supposed to be. The subject matter of our investigation concerns misconduct in office, bribery and extortion with the possibility of charges in those areas, and

I feel it's highly relevant to determine whether or not Mr. Portash was paid for services actually rendered, or was not paid for services rendered at all. And these documents pertain to the services he rendered to the Madison Agency, a corporation. Now, the reason being that we, we have been unable to locate these records through the Madison Agency because the proprietor of the Madison Agency is no longer within the jurisdiction.

Mr. Dowd: Your Honor, may I address you on that? I think that last part by the Deputy Attorney General really sums up my argument as well as I could have done. I follow his logic, question of probable (14) bribery, extortion, and misconduct in public office. And they don't know, paraphrasing the remarks whether or not his work with the Agency was, or was not sufficient to justify income, if I follow the logic.

Now, they're asking my client to give them evidence from which they will conclude 23 or a quorum of Grand Jurors with the advice and assistance, and analysis of the Deputy Attorney General's office, whether or not these documents justify the receipt of that money, and I'm talking criminally, your Honor, criminally justify. And let's assume they received them, and they conclude that they don't justify it, then they're going to indict him? What they're doing is fishing with the future of my client, via some documents, and I assume some testimony, your Honor. There will have to be some prerequisite to getting these documents from the individual, and the question is really on target that the Deputy Attorney General has stated, they don't know whether it is criminal contact, and they want to look at these documents to find out if there is, not from some corporate source, but from the very target, and a target means the person to whom the poisonous arrow of accusation is

aimed, to give them evidence upon which they may, and I can't say probably 'cause I (15) don't know their facts, but to give, to give the Government evidence upon which they can indict him, and possibly convict him of a crime, Judge.

Mr. Luciani: Your Honor, in all honesty, I find that comparison to be somewhat irrelevant. The point is that anytime a search warrant is issued, even though it may govern a situation where there's private papers, it's incriminating, or it's believed to be incriminating, otherwise it wouldn't be requested. The point is that if in fact these are what they purport to be, or what it's purported they are, I don't see how a mere representation that they are incriminating should satisfy the Court. If they are what they purport to be, they can't be incriminating. It's only when they are not what they purport to be can they be incriminating.

Mr. Dowd: Your Honor—

The Court: Well—

Mr. Dowd: I appear—.

The Court: If—

Mr. Dowd: I don't know how this procedure operates because it's sort of a yes we have no bananas doctrine anyhow that you can't say I, I don't want to show you what I have because it's the gun I held the bank up with. It's a contradiction that (16) on these, but this subpoena, your Honor doesn't say give us any records of Madison Agency, Inc., or Donald Saffron, Inc., the corporate records. It doesn't say that, Judge. It says any records, memoranda, notes, or other documents made in connection with employment.

Now, this includes, your Honor, any of the documents of my client that may never have gone to the, these so-called employers. The Deputy Attorney General has

no way, unless he's the prophet or the son of a prophet, to know what it is in my client's briefcase. There's no possible way, and there is, this habitual reference that everything that's in here is or was in those corporate books or files, and there is no possible way, with due respect to the Deputy Attorney General, there is no possible way he can know about it.

Mr. Luciani: Your Honor, I would like to call just one final thing to your attention, and that is the Public Employees Immunity Statute. I feel, in addition to the subpoena that we have before the bench, it's N.J.S.A. 2A:81-17.2A, Et Seq., it gives a public employee the affirmative obligation to testify before Grand Jury, a Grand Jury. It also gives corresponding immunity automatically and self-executing (17) to anything that results from that testimony.

Now, I fail to see, in light of that, in light of the fact that its, that Mr. Portash is a public employee, and in light of the fact that the investigation surrounds his public employment, how he can claim that he has the right to withhold that information on the grounds of self-incrimination.

The Court: Now, you're finally getting to the nub of it.

Mr. Dowd: Your Honor, may I state our position in relation to that Statute? Firstly, I think it's unconstitutional in that it's—

The Court: Well, that's—

Mr. Dowd: It's a statutory attempt to amend the Federal Constitution, the Fifth Amendment, and the Fourteenth Amendment due process clause which makes us applicable to the, applicable to the State, but be that as it may, your Honor, under 2A:81-17.2A1, it reads that

it shall be the duty of every public employee to appear and testify, matters directly related to the conduct of his office. They took related, which is a very broad term, your Honor, and they put in the adjective directly related. The point there I want to make, Judge, supposing that some (18) of the testimony, and/or documentation sought by the Attorney General in the Statewide Grand Jury is not directly related to his public employment, that Statute, therefore, I respectfully submit, your Honor, or that Statutory coverage, assuming that that Statute is Constitutional, would not be applicable to protect my client and, therefore, I come before this Honorable Court with a two prong fork for protection. One is the Fifth Amendment to the United States Constitution, via the Fourteenth Amendment, which is applicable here, that he not be forced to testify against himself or give incriminating documents.

Secondly, your Honor, that this Statute 2A:81-17.2A may be unconstitutional if it is, I don't know if the protection my client is entitled to, Constitutionally, would protect him here.

Mr. Luciani: Your Honor, I just have a very short statement to make, and that is basically I don't see how anything could be more directly related to the office than allegations made public, that there was either extortion or bribery, and that there was misconduct in office as a result thereof.

Secondly, if in fact the Attorney General goes astray in the Grand Jury, I think there are judicial (19) remedies for that. I think there are, that the objection is untimely made at this time, and I think that the mandate, the public policy mandate contained in 2A:81-17.2A1, establishing the duty of a public employee to testify is overriding in this

case. There's automatic immunity granted from anything testified to, and any fruits derived thereof, and I think in light of that fact, Mr. Portash has absolutely no right to withhold this information from the State Grand Jury.

The Court: You are referring to all four items, or just the two middle items?

Mr. Luciani: The middle items, your Honor. I'm sorry.

The Court: All right. I find that the subpoena, insofar as it relates to Federal Income Tax Returns and bank statements does not have to be honored by Mr. Portash, but I further find that the other documents requested shall be produced by the witness, and I hereby direct him to appear before the Grand Jury and honor the subpoena as it complies to the record of expenses connected to employment by Madison Agency, Inc., and/or Donald Saffron, Inc., and any records or memoranda, notes or other documents made in connection with employment by either or both (20) of those companies.

I think the State, having warned Mr. Portash that he's a target of this investigation, will have to move very carefully to make sure that they do not, thereby give him immunity simply by calling him for these records, that's their problem.

Mr. Luciani: Your Honor one, two final things. Included in your oral order, would there be a requirement that he testify and identify these records?

The Court: You're not asking him to do that.

Mr. Luciani: Well, in order to be presented to the State Grand Jury, someone has to identify the records to them.

The Court: Well, I'll direct him just to identify them, but as to any questions about them, you're not asking him to do that. You'll, you're subpoenaing him for his production of records, and that's all he has to do is identify the records, and that's it.

Mr. Luciani: On final thing, your Honor, is that Mr. Portash, as I understand Mr. Dowd, has represented to me is not feeling well, and I would request the Court to do, take possession of the documents until Grand Jury date could be rescheduled for Mr. Portash.

(21) The Court: What about that, Mr. Dowd?

Mr. Dowd: Well, your Honor, I have no objection to, nor does my client have no objection to the Court taking custody of the documents In Camera until such time as Mr. Portash may appear before the Grand Jury. I suppose in the sense of security, we're seeking an impartial forum so nobody will peak, your Honor, until we dispose of the matter.

The Court: All right. I'll put them—

Mr. Dowd: We may be burdening the Court, but we have no objection.

The Court: All right. I'll put them in my safe with all the wiretap information that I have. It's fireproof, burglar-proof, they tell me.

Mr. Dowd: Your Honor, is your Honor—

The Court: Yes?

Mr. Dowd: May I put on the record my client will not be contemptuous of this Court's directed order, however, in listening to your Honor's statements, and that may be dictum that he's merely to respond to questions, I guess about the possession of the documents only?

The Court: Just as to what they are, I presume. I assume that's what the question is, what is this, what is that, or maybe not even that much.

(22) Mr. Dowd: It's going to create enormous problems of incrimination of my client, and if he does not incriminate himself in some areas, your Honor, he may, by re-

maining silent, vis-a-vis each document, be potentially—I'm naturally seeing all the ghosts in the cemetery, he may be potentially exposing himself to charges of misrepresentation, obstruction of justice, et cetera, maybe qualities about the documents, your Honor, which we want to have some understanding. This is what we have, but we don't represent they're anything with what was in my possession. We don't want to represent their authenticity, their accuracy, their lack of accuracy. Do I make sense, your Honor? And i know I'm talking circuitously, but I must because of the awkward position I'm in in protecting my client's interest, your Honor.

Mr. Luciani: Your Honor, first of all I don't think, in my humble, that that's adequate identification. I think in order for it to be identified, it must be identified as having been prepared, A, B, and C, when and under what circumstances. That's first, but secondly, and I think again the most overriding thing, he is a public employee, and the immunity grant under the Public Employees (23) Immunity Statute insulates him for any testimony he gives under such circumstances. So I can't see what objection, at least at this time—

The Court: It only insulates him as far as the public office is concerned.

Mr. Luciani: No, it insulates him from use of that evidence and fruits of that evidence in a subsequent criminal prosecution.

The Court: Regardless of it, whether the prosecution relates to public office or not?

Mr. Luciani: If I may read 17.2A2 if any public employee testifies before any Court—

The Court: Yes, I realize that. I realize what that says, Mr. Luciani, but let me—

Mr. Luciani: Yes, sir?

The Court: You can't take things out of context. The only reason a public employee would testify would be because of the preceding Statute which makes it the duty of every public employee to appear, and testify upon matters directly related to the conduct of his office.

Mr. Luciani: That's true, your Honor.

The Court: So if he's not a public employee, then he doesn't have any duty to appear and testify as far as one is concerned.

(24) Mr. Luciani: True.

The Court: If he doesn't have any duty to appear and testify, then the immunity—

Mr. Luciani: Well, he does have an obligation to appear and testify as to matters directly pertaining to office, otherwise our—

The Court: That's correct.

Mr. Luciani: It's our understanding that extortion or bribery, although incidental to office, directly pertains to office.

The Court: I'm not quarreling with that statement, but what, it sounded to me like what you're suggesting is that if these documents reveal Mr. Portash's involvement in some crime not related to his office, that he will have immunity from that prosecution for that crime, and I don't think that's the effect of this Statute.

Mr. Luciani: No, I don't think that's—well, I'm not sure. I think it would be in this sense, your Honor. If he were compelled to testify as to matters directly pertaining to his office and coincidentally it was also another crime, I think he would be insulated.

The Court: Well, the record seems to be clear that you are proceeding against Mr. Portash, I shouldn't (25) put it that way, that you are subpoenaing him because of his public office.

Mr. Luciani: That's correct.

The Court: Well, Mr. Dowd, the only thing I could say is we're just going to have to take it one step at a time. I can't make, don't see how I can make any blanket rule now about what Mr. Portash has to answer, and what he doesn't have to answer with respect to the, with the documents. It may well be that you're going to have to do it on a question by question basis, and—

Mr. Dowd: Yes.

The Court: He's asked a question, then he goes outside and tells you what it is, and you make your recommendation about answering or not answering. I don't know how else to handle it. I can't very well say yes, he must do this, and no he doesn't have to do that.

Mr. Dowd: But I, I realize, your Honor it's academically a very difficult situation, but some how I was trying to be creative enough because of what knowledge is within my brain, vis-a-vis the documents, that we want the State, for a Court that there is no representation by Mr. Portash that whatever documents he has pulled from his personal file in (26) compliance with the subpoena under question, no representation by him as to their authenticity, their accuracy, or their lack of accuracy, or lack of authenticity. You know what I'm trying to say, your Honor? We may be asked are these your records, did you bring them, yes, and then say oh, they may find things out that maybe we don't know that are improper, and then their, they could be exposed to a danger of obstruction of justice as one example. And it is in that content that when you go in alone with the documents you're in a jackpot, if explanations should be made if—

The Court: Well—

Mr. Dowd: And if you make explanations, then you'll testify, or incriminate yourself, or a combination of both,

and that's why we're seeking the protection of the immunities afforded us. If the Court orders us to answer, then I think the logical effect of that is totally immune. I'm trying to put it on the record, Judge, because I can see many many dangers.

The Court: Yes, I understand exactly what you're saying, even though I have no idea what's in that folder, but I just, you're just going to have to handle it on an ad hoc basis. I don't know how you (27) can do it any other way. Is there someway you can seal that folder so that there will be no indication that it's looked at by me or anyone, anyone else?

Mr. Dowd: I'm sorry, your Honor?

The Court: I just want to make sure if there's someway you can seal that folder so it would remain sealed until Mr. Portash does pick it up and appear before the Grand Jury.

Mr. Dowd: I guess some—

The Court: Just some scotch tape.

Mr. Dowd: Do you have some?

The Court: I forgot the Clerk's not here.

Mr. Dowd: Shall I go into Chambers here? I think she's got some in her desk here.

(Whereupon, the folder was handed to Judge Schoch and scotch taped by Judge Schoch.)

The Court: That ought to do it. All right. I'll take this, and it will be in my safe. Now, I won't be available the rest of this week. I'm the only one that has the combination of the safe. Is Mr. Portash coming back tomorrow?

Mr. Luciani: He was going to come back Friday, your Honor.

The Court: Friday?

In Camera Hearing of November 6, 1974

Mr. Luciani: We'll arrange it for sometime next (28) week.

Mr. Dowd: Excuse me just a moment, Judge. Your Honor, I was thinking out loud what the Prosecutor, that maybe just for the purpose of today, since you ordered Mr. Portash to introduce, maybe Mr. Portash could tender the documents without any testimony today, then it would be in the custody of the Attorney General.

Mr. Luciani: I certainly don't have any objection to that.

The Court: That's all right.

Mr. Dowd: I think we'll try that way, Judge.

The Court: All right. And I've got an Assignment Judge's meeting 6 o'clock tonight, and till 2 o'clock on Friday down at the Cherry Hill Lodge.

Mr. Luciani: Thank you, your Honor.

The Court: Okay:

(Whereupon, these proceedings were concluded.)

I, WILLIAM J. RICHARDS, JR., a Certified Shorthand Reporter and Notary Public of the State of New Jersey do hereby certify that the foregoing is a true and accurate transcript of my original stenographic notes taken at the time and place hereinbefore set forth.

WILLIAM J. RICHARDS, JR.

Date: 4-7-75

Hearing of November 6, 1974 Before State Grand Jury

STATE GRAND JURY

TRENTON, NEW JERSEY

IN THE MATTER OF:

STATE GRAND JURY INVESTIGATION

Second Floor Conference Room,
State House Annex.

November 6, 1974

Before:

CARL PETERSON, Foreman, and the State Grand Jury.

Appearances:

WILLIAM F. HYLAND,
Attorney General,
By: ALFRED LUCIANI,
Deputy Attorney General.

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(3) JOSEPH S. PORTASH, called as a witness, being first duly sworn, testified as follows:

Examination by Mr. Luciani:

Q. Mr. Portash, you are here pursuant to a subpoena duces tecum, and you have presented documents because Judge Shoch has indicated you must do so; is that correct?

Hearing of November 6, 1974 Before State Grand Jury

A. Yes. I have a statement I would like to read on behalf of that.

Q. Go right ahead.

A. Under order of Judge Shoch I am ordered to appear at this proceeding after his denial of my claim that the information is privileged and may incriminate me. I understand I am a target of an investigation relating to possible criminal conduct in my capacity as Mayor of Manchester Township, and/or of Ocean County.

Q. I am going to ask you to identify material that you produced pursuant to the subpoena. I show you what has been marked as Exhibit 2. Can you identify this, please?

A. File Jacket of Discussion Letters.

Q. Produced by you?

A. File Jacket of Discussion Letters.

Q. This is the material produced pursuant (4) to your subpoena?

A. Yes.

Q. Mark these. I show you what has been marked as Exhibit 3; can you identify that, please?

A. File Jacket of Larson (phonetically) Bank site.

Q. Again, produced by you pursuant to the subpoena?

A. Yes.

Q. I show you what has been marked as Exhibit 4. Can you identify this, please?

A. File Jacket Seventy-two Shopping Center.

Q. Again produced by you pursuant to the subpoena?

A. Yes.

Q. I show you what has been marked as Exhibit 5. Can you identify that, please?

A. File Jacket of Bank site '69, bank site '69.

Hearing of November 6, 1974 Before State Grand Jury

Q. Again, produced pursuant to the subpoena?

A. Yes.

Q. I show you what has been marked as Exhibit 6. Can you identify this, please?

A. File Jacket '72 L.T.

Q. Again produced by you pursuant to the subpoena?

A. Yes.

(5) Q. I show you what has been marked as Exhibit 7. Can you identify this, please?

A. File Jacket '72 Berkley.

Q. Again produced by you pursuant to the subpoena?

A. Yes.

Q. I show you what has been marked as Exhibit 8. Can you identify that, please?

A. File Jacket '72 Berkley. Yes. It was produced by me pursuant to the subpoena.

Q. I show you what has been marked as Exhibit 9. Can you identify that, please?

A. File Jacket of Dover Township.

Q. Why was this produced?

A. Why was that produced? It was ordered by Judge Shoch for me to produce it.

Q. I show you what has been marked as Exhibit 10. Can you identify that?

A. Yes. Seventy-two D.T. Cooper.

Q. Was it produced by you pursuant to the subpoena?

A. Yes.

Q. I show you what has been marked as Exhibit 11. Can you identify that, please?

A. Seventy-one D.T. Complex, office complex.

(6) Q. Produced pursuant to the subpoena?

A. Yes.

Q. I show you what has been marked as Exhibit 12. Can you identify that, please?
A. Yes. Branch Melody Lane, West County Line.
Q. Was it produced pursuant to the subpoena?
A. Yes.
Q. I show you what has been marked as Exhibit 13. Can you identify that, please?
A. Yes. 70 D.T. Bank.
Q. Produced to the subpoena?
A. Yes.
Q. I show you what has been marked as Exhibit 14. Can you identify that, please?
A. '70 Bank site.
Q. Produced pursuant to the subpoena?
A. Yes.
Q. I show you what has been marked as Exhibit 15. Can you identify that, please?
A. Yes. '71 site.
Q. Produced pursuant to the subpoena?
A. Yes.
Q. I show you Exhibit 16. Can you identify that, please?
A. Yes. '72 Tangorb (phonetically) site.
(7) Q. I show you what has been marked as Exhibit 17. Can you identify that, please?
A. Yes. 70 D.T. Office Complex site.
Q. I show you Exhibit 18. Can you identify that, please?
A. Yes. 70 Madison and Tenth, Lakewood.
Q. I show you Exhibit 19. Can you identify that, please?
A. 71 Dover Township Bank Branch.

Q. I show you Exhibit 20. Can you identify that, please?
A. 71 F.T. Bank site.
Q. I show you Exhibit 21. Can you identify that, please?
A. Yes. Administrative Unit Sheets.
Q. I show you Exhibit 22. Can you identify that, please?
A. Yes. Wait Sheets.
Q. I show you Exhibit 23. Can you identify that, please?
A. Yes. 71 M.L. Bank.
Q. All of these files were produced pursuant to the subpoena?
. A. Yes.

Mr. Luciani: Okay. Thank (8) you. No further questions.

(Hearing adjourned.)

(9) Second Floor Conference Room
State House Annex.

November 6, 1974

I, MARIE E. PIOTROWSKI, do hereby certify that I will keep secret those proceedings of the State Grand Jury typed or transcribed by me on request of WAYNE BUONOMO, Certified Shorthand Reporter.

MARIE E. PIOTROWSKI
139 Reed Avenue,
Trenton, New Jersey 08610.

Hearing of November 6, 1974 Before
State Grand Jury

I, WAYNE BUONOMO, do hereby certify that I will truly record the proceedings of the State Grand Jury; and that I shall keep secret the proceedings recorded by me and will only transcribe those proceedings as requested by the Attorney General or upon order of the Court.

I shall only use a typist to type the transcript who has taken a similar oath to keep secret those matters transcribed.

WAYNE BUONOMO
Iron Gate Apartments, DD-6
Beverly, New Jersey

Hearing of November 14, 1974 Before
State Grand Jury

STATE GRAND JURY

TRENTON, NEW JERSEY

IN THE MATTER OF:

STATE GRAND JURY INVESTIGATION

Room No. 440,
State House Annex,
Trenton, New Jersey

November 14, 1974

Before:

OUT OF THE PRESENCE OF THE STATE GRAND JURY.

Appearances:

WILLIAM F. HYLAND, Attorney General,
By: ALFRED J. LUCIANI, ESQ.,
Deputy Attorney General.

DET/SGT. RAYMOND FELDHERR, N.J.S.P.

JAMES T. DOWD, ESQ.,
Representing Joseph S. Portash.

JOSEPH S. PORTASH

Hearing of November 14, 1974 Before State Grand Jury

(2-3) Mr. Luciani: This is a proceeding outside of the Grand Jury Room, in the anteroom, at which Det/Sgt Raymond Feldherr, myself, Deputy Attorney General Alfred J. Luciani, James Dowd, Attorney for Mr. Joseph S. Portash, and Mr. Joseph S. Portash, are present.

We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury.

No representations have been made insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury—a separate Grand Jury from the one Mr. Portash is about to appear before.

Off the record.

(Whereupon an off the record discussion was held between the parties.)

Mr. Luciani: Mr. Portash is here pursuant to a subpoena served upon him last Wednesday, November 6, at which time he was compelled to appear before a State Grand Jury, pursuant to a subpoena and order of Judge Schoch, and to present documents (4) subpoenaed by said State Grand Jury.

Off the record.

(Whereupon an off the record discussion was held between the parties.)

Mr. Luciani: Mr. Dowd, does that comport with your understanding of our agreement?

Mr. Dowd: We are doing this informally because had we gone through the judicial process claiming privilege we would have gotten to the same result.

Hearing of November 14, 1974 Before State Grand Jury

Further, we take the position that my client was immunized when he appeared last week; and that he considers any testimony today to be incriminating; and that he is given immunity, as you stated on the record.

Mr. Luciani: Mr. Portash, do you understand—have you discussed this matter with your attorney?

Mr. Portash: I believe so.

Mr. Luciani: And you understand the fact that nothing you are about to testify to can be used against you, personally, in any subsequent criminal prosecution?

Mr. Portash: To the best of my knowledge of legal matters, yes.

(5) Mr. Luciani: Are you satisfied with Mr. Dowd's legal representation?

Mr. Portash: Yes.

Mr. Luciani: Okay.

STATE OF NEW JERSEY, }
COUNTY OF OCEAN, } ss.:

(6) I, PEGGY A. MASTRODICASA, do hereby certify that I will keep secret those proceedings of the State Grand Jury typed or transcribed by me on request of Salvatore J. Giaimo, Certified Shorthand Reporter.

PEGGY MASTRODICASA
1465 Cedarhurst Drive
Toms River, New Jersey 08753

Hearing of November 14, 1974 Before
State Grand Jury

I, SALVATORE J. GIAIMO, do herby certify that I will truly record the proceedings of the State Grand Jury and that I shall keep secret the proceedings recorded by me and will only transcribe those proceedings as requested by the Attorney General or upon order of the court.

I shall only use a typist to type the transcript who has taken a similar oath to keep secret the matters transcribed.

SALVATORE J. GIAIMO
47 Old Bridge Drive
Howell Township, New Jersey 07731

Hearing of November 14, 1974 Before State Grand Jury

STATE GRAND JURY

TRENTON, NEW JERSEY

IN THE MATTER OF

STATE GRAND JURY INVESTIGATION.

Room #438,
State House Annex,
Trenton, New Jersey
November 14, 1974

Before:

JON G. SINKWAY, Foreman,
And The State Grand Jury.

Appearances:

WILLIAM F. HYLAND,
Attorney General,
By: ALFRED J. LUCIANI, ESQ.,
Deputy Attorney General.

Hearing of November 14, 1974 Before State Grand Jury

(4) JOSEPH S. PORTASH, being first duly sworn according to law, testified as follows:

Examination by Mr. Luciani:

Q. State your name, please. A. Joseph S. Portash.

Q. And where do you live? A. 200 Wrangle Brook Road, Lakehurst, New Jersey.

Q. Do you know a man by the name of Donald Safran? A. Yes.

Q. Do you know a man by the name of Robert Schmertz? A. Yes.

Q. Were you employed by the Madison Agency in the years 1971 and 1972? A. Yes.

Q. I hand you what has been marked as State Grand Jury Exhibit No. 23.

Can you identify this file, please? A. "71 M.L.D. Bank, West Side of Route 37."

Q. Can you identify the contents of that file, please? A. Yes.

Q. Can you tell us when the contents of that file was put together?

The Witness: When the contents of the file was put together?

(5) Mr. Luciani: Yes.

A. I guess, to the best of my knowledge, it would be after November of 1972.

Can you explain for the Grand Jury why the contents of that file was put in that file in November or after November of 1972? A. I don't follow your—

Q. You indicated that the contents of that file was made up after November of 1972— A. Right.

Hearing of November 14, 1974 Before State Grand Jury

Q. —is that correct? A. Yes.

Q. On the file it says November of 1971. A. Correct.

Q. Is the date on the file incorrect? A. Yes.

Q. Did somebody prompt you to have a file put together and have an inappropriate date marked on the top? A. Yes.

Q. Could you explain to the Grand Jury what it was that caused you to do that? A. The start of an investigation by the State Police or the Statewide Crime Commission, whichever it is.

Q. Why did you—all right. Strike that. Whose idea was it to prepare files in November or after (6) November of 1972 because of the pending investigation? A. I guess, to the best of my knowledge, I would say it was Mr. Safran and myself.

Q. Why? A. Well, actually a lot of the work was done originally and is was done to substantiate the work, itself; and it was felt that without that type of information in the files, that it just would not be correct.

Q. It would not be believable? A. Believable.

Q. Again, I show you State Grand Jury Exhibit No. 23. Could you explain the top evaluation sheet to the Grand Jury? A. It is a planning evaluation sheet used on the parcels of property regarding the utilization factors of that property for any type of usage. It is a very common rating type of sheet that is used and information gathered to determine that.

Q. And where did you get the information to put on that sheet? A. Mr. Safran.

Q. Did he give you—did he give it to you orally or in writing? A. Orally.

Q. Over the telephone or in personal conversation? (7) A. Personal conversation.

Hearing of November 14, 1974 Before State Grand Jury

Q. Where did that conversation take place? A. Once at my home and, I believe, to the best of my knowledge, at his home.

Q. Now, among the files that you presented to me last week, how many were prepared after November of 1972 because of the State Police investigation?

The Witness: How many were prepared?
Mr. Luciani: Yes.

A. All.

Q. Did Mr. Safran prepare—give you the information to prepare all of them given to you by Mr. Safran? A. Yes.

Q. Did anyone assist in the preparation of those files by giving information or advice, other than Mr. Safran? A. No.

Q. Since that time had anybody contacted you concerning accounts of your employment at Madison Agency? A. Yes.

Q. Who? A. At the—I'm trying to—you have to excuse me. I'm trying to figure the right, correct, truthful wording that I could use.

I was called to a meeting and the meeting was in Mr. Giordano's office, a lawyer. I think it was in Middletown (8) Township.

Q. And what was—who was at that meeting? A. At the meeting was Mr. Giordano—

Q. The older or the younger? A. The younger.

—Mr. Halleran, Mr. Safran, Mr. Schmertz, Mr. Steinberg, who I asked to come with me. He didn't have any knowledge; I asked him to be my legal representation at this meeting.

Hearing of November 14, 1974 Before State Grand Jury

Q. And this is Morton Steinberg? A. Yes.

Q. What transpired at this meeting, Mr. Portash? Give us as close an account as is absolutely possible. A. Well, to the best of my knowledge—that's a couple of years back—I was called to this meeting after the investigation had started.

Q. Can you place in time when that meeting took place? A. I believe, the first contact of the initial investigation was sometime in November, around Thanksgiving.

Q. Your contact to you? A. Yes; first contact. I was called to a meeting after that, and I don't have the—

Q. Was it before Christmas? A. I can't answer truthfully; I don't know whether it was before Christmas or not.

(9) I was called to a meeting, and at that meeting the general consensus was: Well, you know, there must be something substantiated by records to justify the compensation that you were given as an employee of the firm.

Q. Why was Mr. Schmertz there? A. You know, I don't—

Q. How did he participate in the conversation? A. Very little. You know, I don't even remember him speaking. He was just there.

Q. Go ahead. Continue. A. And it was stated that some justification would have to be prepared because the initial contact had been made and undoubtedly that the next—wait a minute, now—the initial contact, when it was made, was only for very minor records—something minor of the Madison Agency; and, at that time, Mr. Giordano had, I guess, stated at this meeting that if—that the next course, of course, would be to call you or Mr. Safran in to justify whether your work was there,

Hearing of November 14, 1974 Before State Grand Jury

and that there should be something to justify that work. That's what the meeting was about.

Q. And what, in more detail, was decided upon at that meeting? A. Well, there was no recommendations at that meeting to (10) come out—except that, you know, Mr. Safran and I would have the work justified; and then this was decided upon (indicating) because this was the standard planning technique which I had used many times before. The standard planning technique was my idea, not Mr. Safran or anyone else, to use.

Q. Did anyone at that meeting indicate that the records that you were to prepare should be prepared irrespective of their authenticity?

Mr. Luciani: Do you understand the question?

The Witness: No. I think I would like to ask my attorney about that question, if I may.

Mr. Luciani: Yes.

The Witness: Would you repeat the question?

The Reporter: "Question: Did anyone at that meeting indicate that the records that you were to prepare should be prepared irrespective of their authenticity?"

The Witness: Excuse me?

Mr. Luciani: Yes.

(Whereuopn the witness left the Grand Jury Room.)

Hearing of November 14, 1974 Before State Grand Jury

(11) JOSEPH S. PORTASH, upon returning to the Grand Jury Room, being previously duly sworn according to law, further testified as follows:

Examination by Mr. Luciani:

Q. Do you recall the question? A. Yes, sir.

Q. Would you answer it, please? A. Mr. Giordano and Mr. Halleran.

Q. And what did they say, do you recall? A. You know, its very difficult to recall at this time.

Mr. Luciani: I realize you can't recall the exact conversation.

A. (Continuing) They stated very candidly that if this type of records were not developed, that there would be no justification, and they should be developed in case this went further.

Q. Irrespective of their authenticity? A. Well, they did not, you know, say "irrespective of their authenticity."

Q. What did they say? A. That the records should be prepared.

Q. What records? A. Of employment. Something to state that this money was made by being gainfully employed.

(12) Q. Was it made clear to you that it didn't matter whether you had done the work? A. Yes. I believe—you know, to the best of my ability, I would say, yes.

Q. Who called you to that meeting? A. Mr. Safran, I believe.

Q. And at that meeting you indicated that Mr. Schmertz was present, but did not participate to a large extent? A. That's correct.

Hearing of November 14, 1974 Before State Grand Jury

Q. But he was in the room? A. Yes.

Q. Did Mr. Schmertz know that you were employed by Donald Safran? A. I believe he did.

Q. How do you know? A. Well, you know, we were on the same bank board together. He would mention, you know, "What are you doing?" or something along these lines.

I believe he had knowledge, yes.

Q. Did you ever have any direct conversation with Mr. Schmertz back in 1971 or 1972 concerning your employment with Madison Agency? A. Yes.

Q. Could you outline basically what that conversation entailed? (13) A. Well, you know—

Q. Was it at a board meeting? A. Yes; it was at a board meting. It would be like general conversation. It would be like, you know, "How are you getting along?" and I would stay, "Okay" and this type of thing; "Are you working hard?" or generally like this, and, you know, along these lines.

Q. And how would the Madison Agency name or Donald Safran come into the conversation? A. Well, he would mention the Madison Agency.

Q. There was no question in your mind that he knew you were employed there? A. I would say, there is no question in my mind that he knew I was employed there.

Q. After that original meeting at which the plans were outlined, did you have any discussion with anyone, other than Donald Safran, before March of 1973— A. No.

Q. —concerning this? A. No.

Q. In March of 1973 you had another visit from Det. Feldherr; isn't that correct? A. Yes, sir.

Q. And at that time, Mr. Feldherr took certain letters from your possession— (14) A. Yes, sir.

Hearing of November 14, 1974 Before State Grand Jury

Q. —or copies there? A. Yes, sir.

Q. Were all of these letters prepared on the dates indicated on the letters? A. No. One was a—one was not prepared at that time.

Q. Which one? Can you describe it? A. I believe the one that stated 5,000 pre—if I could see the letter—

Q. I show you what has been marked as State Grand Jury Exhibit No. 17 before another Grand Jury.

Can you identify that, please? A. Yes.

Q. Can you tell us when that particular letter was prepared? A. After the contact by the State.

Q. Can you place it in closer perspective; was it in 1972? A. I wouldn't know. It was after contact by the State.

Q. Do you know who typed it? A. I didn't.

Q. Do you know who did? A. Well, I don't know who typed the letter, but it was sent to me from Safran.

Q. It was sent to you from Safran? A. Yes, or from the Madison Agency.

Q. But you have no knowledge as to who actually typed this (15) particular document? A. I was always under the impression that his wife may have typed the document. I don't know.

Q. You also gave Det. Feldherr a letter of resignation; isn't that correct? A. Yes.

Q. What prompted that letter of resignation? A. I was advised by my attorney, Morton Steinberg, that I should resign, immediately.

Q. Why? A. Well, he stated that as far as—in his opinion, he stated, that there may have been other things that they were involved in that you have no knowledge of whatsoever, and it would probably be best for you to get out and either try to go into your own business or do whatever you want to do.

Hearing of November 14, 1974 Before State Grand Jury

Q. Did you discuss the contents of your resignation letter with Mr. Steinberg? A. Yes.

Q. Were the reasons set forth in the resignation letter true—the true reasons for your resignation?

The Witness: Let me read the resignation letter.
Mr. Luciani: Would you mark this, please.

(State Grand Jury Exhibit No. 1, which (16) consists of a letter dated November 28, 1972, was received and marked for identification.)

Q. I show you what has been marked as State Grand Jury Exhibit No. 1 in this Grand Jury.

Can you identify that, please? A. Yes.

Q. What is it? A. This is a letter that was sent to me, resigning from the firm.

Q. It was sent by you or to you? A. Sent by me to Safran Agency.

Q. Did you read the letter? A. Yes.

Q. Are your reasons stated therein the true reasons why you resigned? A. Yes: all except for the fact that my attorney also advised me to resign because if the State of New Jersey was investigating that firm, that he had heard also some bad reports about the firm, which I had nothing to do with.

Q. What firm are you referring to? A. Madison or Safran Agency.

Q. So, a contributing factor to your resignation was the pending investigation? A. Oh, yes.

Q. Was that a prime factor?

(17) The Witness: To get out of the firm?
Mr. Luciani: Yes.

Hearing of November 14, 1974 Before State Grand Jury

A. I would say, it was a prime factor.

Q. After March of 1973, very little happened until approximately September of 1974, vis a vis this investigation; is that correct? A. Correct.

Q. During that span of a year and six months, did you have any conversations with anyone concerning this matter? A. Yes.

Q. Can you recount them for us? A. Yeah. I talked to Mr. Steinberg about the matter. You know, in general terms, being under investigation, of course, causes a great amount of anxiety, and that was discussed with him as my attorney. I also—

Q. Did you ever discuss again with him the preparation of these files? A. I never discussed that with Mr. Steinberg.

Q. But he was present at the original meeting? A. Yes; but I never—

Q. Did he say anything at that original meeting? A. He was there as my attorney because I felt that maybe I was trying to be used as, you know, a fall guy, and I wanted him to represent me at this particular meeting.

(18) Q. And did he represent you? A. Yes.

Q. What did he say at that meeting? A. Well, he really didn't talk at the meeting, except afterwards.

You know, I really don't know what the gist of the conversation, you know, was, except sort of implying "How could you ever be so stupid as to get involved like this?" and this type of thing.

Q. What did he advise you to do? A. He advised me to be cooperative. If the State or if anyone came to talk to me, he advised to be cooperative.

Q. What did he advise you to do with regard to the files? A. Nothing. You know, didn't say a thing about them, not, you know, in any sense.

Hearing of November 14, 1974 Before State Grand Jury

Q. At the meeting of after the meeting he didn't advise you not to— A. I think what he did was to try to shy away from giving me any advice as far as illegally preparing that type of thing.

Q. Did you ask him directly whether or not you should do it? A. No.

Q. Did Mr. Safran ask Mr. Giordano whether or not it should be done? A. I don't know. I don't have any recollection of that. (19) You see, the major point probably would be—is my lack of actually doing the writing documents because I was so busy being a politician and not having time to do the work, so it is really my—

Q. Did you, in fact, look at every piece of property that is listed in here? A. No.

Q. And, in fact, you didn't have the information to prepare these files? A. Not all of them, no.

Q. Did you do any land site evaluation for Mr. Safran? A. Yes.

Q. Now, let's get back to the conversations you had after March of 1973 with Mr. Steinberg.

Other than indicating to him that you were somewhat apprehensive, what did the conversation entail? A. You know, it's a very difficult thing to remember. This was after when in 1973?

Q. In March—after March of 1973, after you had given the letter to Det. Feldherr. A. You know, I never would really discuss it, except when they would call me; and Mort would give me advice as to what to do regarding if an invetigator had called. He told me to be cooperative, which I was.

When they stole the letter off my—excuse me—yes. (20) When they stole the letter off my desk, which is the letter you have here—the State Police took this without

Hearing of November 14, 1974 Before State Grand Jury

my knowledge and took it off the desk. We wrote them a letter in there asking for a copy of that because they had no right to take that letter off my desk. That was his opinion and we talked about that and—

Q. Did you offer the letter to the detective to see in your office? A. I believe, I did.

Q. You let them read it? A. I let them read the whole file.

Q. Did you also give them other letters at that time? A. I don't know whether it was that time or the time before, but they had other letters.

This one was on the end of the desk; and when I went out of the room, they took it and the detective said he inadverently put it in his file with all the rest of his papers when he left.

Q. Did you discuss the matter, prior to September of 1974, with anyone other than Mr. Steinberg?

The Witness: Did I discuss the matter prior to September of 1974?

A. Yes; I think with Giordano and Schmertz at the bank meeting, you know, I discussed the pending investigation.

Q. Now, I know it is difficult for you to recall the exact (21) conversation, but what we want to do is get the sense of it.

What was the context of the conversation: Did it center around the preparation of the files; did it center around the state of the investigation; did it center around your apprehensiveness; did it center around something else, as best as you can recall? A. You know, it's like—it would be like you would go to a bank meeting and, you know, before you were sitting there having a cup of coffee maybe

either Giordano or Schmertz would say to you, "Things look pretty good. The State Police haven't been back"; you know, this type of thing. This general type of conversation.

There was nothing specific because maybe they didn't want to be specific—I don't know—but it was just a general type of thing.

Q. Who kept them apprised of the state of the investigation? A. I don't know.

Q. Did Mr. Safran ever indicate to you any conversations he had regarding this investigation with Mr. Schmertz? A. No; he never talked to me about anything that he had talked with Schmertz.

Q. In addition to those bank meetings—those bank meetings, did they occur once a month? A. Once a month, sometimes two if there was an emergency (22) meeting.

Q. How well do you know Mr. Schmertz? A. I have known Bob Schmertz since about the early 1960's.

Q. Did you—how did you come to know him? A. I was County Planning Director and knew of him.

He would come to the County Planning Board meetings or I would be speaking throughout the County and he always used to say to me "Why don't you quit government and come into my employ as a planner?" and he offered me jobs in that area; and he was a very successful or is a very successful builder and developer.

Q. And did you, over the years, become friendly with him socially? A. No, not socially. I mean, his plane was a little bit higher than my plane.

Q. But there did come a time when he invited you to become a member of the Board of Directors of the bank: is that correct? A. Bob Schmertz is a very—he is a man that constantly wants to, you know, try to do something

for you. Like, you know, "Here is tickets to the Boston/Celtics basketball game" but I never did go, and, you know, "You can use my airplane whenever you want to" this type of thing.

I never done that. It is just his nature of, you know, (23) of being that way.

When the Freeholder who had held the office died, Robert J. Miller, I was appointed to his place. I guess one month after I took office I was asked by Mr. Schmertz, who made the initial contact for me to go on the bank board, and I told him I didn't want to go on the bank board at that time.

Q. Did you tell him why? A. Well, you know, really because I think it was—I really was not certain as to whether that was a correct thing to do or direction to go at that time.

Q. Didn't it also involve a fairly substantial amount of money, the purchase of an interest in the bank? A. Yes.

Q. Was that a contributing factor to your initial refusal? A. Well, I don't know whether that was a contributing factor as much as—because they, you know—you know, it was stated to me that I could borrow the money, at, you know, a percentage rate which was legal by law, on my signature and purchase the stock.

I don't know whether that was a contributing factor as much as the fact of just being a little bit leary as to what was going on. You know, I didn't know whether that was a correct way to go.

After checking around, I found out that it was permissible (24) by law for a Freeholder to be on a bank board, so I guess I went on in the early 1970's or somewhere around that period; I don't know the exact date.

Q. You are also employed by the bank, are you not? A. Yes.

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Q. What—who got you that job? A. Mr. Schmertz.

Q.What capacity do you hold in the bank? A. I am a bank Director in the Real Estate—

Q. What work do you actually do? A. Well, we used to have an appraisal team, which is quite common in the bank, and you would go out and contribute to the appraisal of property.

Mr. Luciani: Let's continue on with your conversations.

Q. Were there any other conversations prior to September of 1974? A. There probably were, but, you know, I really don't—if I think of any, I would be very happy to tell you, but, you know, there probably were.

Mr. Luciani: Let's talk in terms of specific individuals.

The Witness: Okay.

Q. Did you ever—strike that.

Do you know Herb Kaplan? (25) A. Yes.

Q. How do you know him? A. I met him once—I guess it was a Saturday or Sunday—when I was in the Madison Agency, had coffee with him upstairs, talked with him.

After—I guess that was after, you know, this thing started: the investigation.

Q. Did Mr. Kaplan know that you were an employee of the Madison Agency? A. Yes; I believe he did.

Q. Did Mr. Kaplan, to your knowledge, know that these files were being prepared? A. I don't know. I can't answer that question honestly.

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How about Dave Pinsker? A. Dave was an accountant for the bank, I believe, at one time or was on the bank board for a very short period of time.

Yes; I know Dave Pinsker.

Q. Do you know whether he knew you were employed by Madison Agency? A. I don't know. I never discussed the Madison Agency with Dave Pinsker, but I imagine he did because he knew Bob Schmertz and he was very close to Bob Schmertz.

Mr. Luciani: Let's go onto September of 1974.

(26) The Witness: All right.

Q. Around that time, newspaper accounts began, and prior to actually officially commencing an intensive investigation there was a span of four to six weeks. Can you outline for us who you talked to during that period about this investigation?

The Witness: You mean, during the newspaper—

Mr. Luciani: Prior to the actual commencement of this investigation.

A. Well, I guess it was Mr. Giordano who was extremely upset because I had released the fact publicly that I worked for the Madison Agency.

Q. Did he call you? A. I don't know whether he called or this was at a bank meeting. I really don't know, but the contact was made. I don't know whether it was by phone or in person. I really can't say.

Mr. Luciani: That's okay.

Q. What did he say to you? A. He said to me that I was very foolish and that I should shut up.

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Q. Those were pretty much his words? A. In those—

Q. Did he detail anything more—anymore of an explanation? (27) A. No. He said, "Just shut up. Keep quiet."

Q. Did he say anything about why you should shut up or why you were foolish? A. No—

Q. He thought you would understand— A. —he just said "Shut up. Keep quiet."

Q. —what he was talking about? A. Yes.

Q. Did he say, "How stupid can you be, releasing the fact that you were employed"? A. No. He just used those words, but, you know, when you have—I think, as an individual, if you do something, you know what you have done and what is being referred to.

Q. In addition to Mr. Giordano, did you have any conversations with anyone else prior to the commencement of this investigation?

For example, did you speak to Mr. Safran? A. No, I never have—I haven't been able to talk to him or even see him since sometime in '72 or '73. I don't even know where he was; he disappeared.

Q. Did you speak to Mr. Schmertz? A. Occasionally, yes.

Q. Can you outline for us what conversations you had? A. Well, he would never refer, you know, to the type of thing. It is usually "Would you like to go to a ball game?" (28) or something along those lines.

Q. In terms of the context of the newspaper accounts and your release of the information that you were employed, did you have any conversation with Mr. Schmertz in 1974—in September of 1974? A. At the bank meeting he also told me "You just opened yourself a can of worms by releasing your financial association with the Madison Agency."

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I don't know if those are the exact words, you understand; it is very hard to know the exact words.

Q. But there is no question in your mind that is the sense and the meaning? A. Yes.

Q. In addition to those conversations you just outlined with Mr. Schmertz and Mr. Giordano, around the same period of time, but prior to my beginning my investigation, do you recall any other conversations that you had? A. I may have discussed this with my attorney, Morton Steinberg, until I changed and got Mr. Dowd. I may have discussed it with him, yes.

Q. At the time you discussed it with Mr. Steinberg, did you discuss the files? A. No. He consistently told me that if I was contacted to tell the truth and be very open about it.

Q. Tell the truth and be very open about it? (29) A. Yes.

Q. But he never told you not to prepare the files? A. About the files no. The preparation of the files—of that document was my idea.

Q. Of all these files? A. Yes; the preparation of that document. No one told me.

Q. The specific document? A. Yes.

Q. But the idea to create work records was whose idea? A. It came out of that general meeting over there.

Q. Was it Mr. Giordano's idea? A. It was either Mr. Giordano or Mr. Halleran. Either one.

Q. You thought of what would be the best records? A. That's correct.

Q. When I began my investigation, you had several conversations with many people pertaining to this conversation; isn't that correct? A. Sure.

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Q. For example, you discussed the matter with Seymour Kagan? A. Yes.

Q. And at that time you indicated to him that you would like to speak with me? A. Yes.

Q. Did you have any conversation with Mr. Giordano? A. No.

(30) Q. Not since this investigation began? A. The last conversation that I have had with Mr. Giordano was at the October board meeting—that was the last time—and the conversation was with Mr. Giordano and Mr. Schmertz, which they both told me, at that time, "Your chances of being indicted are very good. You are going to be indicted." That was, in essence, what they said.

Q. Did they indicate to you any concern about the preparation of work records and— A. No.

Q. Their involvement? A. No.

Q. And since that time—since that October meeting, you have had no conversation with Mr. Schmertz? A. No.

Q. Prior to that, did you have any conversation with Mr. Schmertz? A. Just at the bank meeting or, you know, by telephone or—you know, I really don't know. I probably had talked to him, but you know, I—it's very hard to remember exactly what—you know, how—

Q. Not "exactly what", but, generally, did you discuss the investigation and how it pertained to you and possibly him and Mr. Giordano and Mr. Safran? (31) A. No; I never discussed the investigation—you know, how it pertained to Mr. Schmertz; in that area—because I don't know whether, you know, Mr. Schmertz even knew what was happening.

Q. He was at the meeting; wasn't he? A. Yes.

Q. That's the meeting with Giodano back in 1972? A. Yes. It seemed that he, after that, became very, you

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know—you know, I guess, once the investigation started, he became very cool, whereas there used to be a tremendous amount of contact and phone calls. This immediately stopped.

Q. It immediately stopped? A. Yes.

Q. And did you speak with anyone out of the Giordano firm concerning this investigation? A. Well, I spoke with Sy Kagan pertaining—

Q. That's a different law firm? A. Yes.

Q. Did you speak with anyone in Giordano's firm? A. No.

Q. In your conversations with Mr. Kagan, did you indicate to him, in any way, that your work records were, in any way, not authentic? A. No. No; I just didn't talk to Mr. Kagan about anything with (32) work records.

Mr. Kagan and I were very close because of his being Solicitor for the Utilities Authority, and his law partner is County Counsel.

Q. Did you speak to anyone at Leisure Technology: Mr. Peter Davis, Justin Segal? A. No, not about this. I spoke with Justin Segal many times when he was before the Township in meeting with the Township. I knew Justin Segal.

Peter Davis, I know of, but not that well.

Q. Did you speak to anyone at all at Leisure Technology concerning this investigation? A. No.

Q. Did you speak to Mr. Kaplan concerning this investigation? A. Yes. Mr. Kaplan came over my—he called me up and he stated that I have the original copies of these records—those documents.

Q. Mr. Kaplan said this? A. Mr. Kaplan. He said one of the items that was in the newspapers is not true. He said "You didn't do the evaluations on that, so you should go back to the newspapers."

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I said, "Look, I am not going back to any newspapers and say anything."

He said, "Well, I'll be over to see you."

(33) He came over to my house. He had the originals of those records in the back of the trunk, and he stated to me what did I want to do with them.

He said, "Do you want me to burn them, get rid of them?" and I said, "I don't want to know anything about those records. I have my copies of those records. They are not mine. They belong to the corporation. I don't want the records."

Q. And that was it? A. And that was it; and I have no knowledge of where his records are or where the other records are.

Those are the duplicate copies that I had when you subpoenaed—

Q. Did Mr. Kaplan indicate that he knew that these were not authentic? A. No, he didn't. He just indicated, I believe, that Safran gave them to him and he had possession of them. That's all.

Q. Did you actually see them? A. Yes. He showed me one of the copies on the Standard Roofing, which was my handwriting.

Q. That's the Tamber property? A. Yes; which was the original.

Q. And did you have any discussion with regard to the Tamber property? (34) A. Yes. He told me that the site that I evaluated was actually next to it because the newspaper had stated they thought it was a conflict: my evaluating the site and then approving at the County Planning Board.

"You didn't really evaluate the site; that was sold

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after that," he told me, "so you actually had no dealings with that particular site."

I told him that was very nice, however it would be very foolish for me to go back to the newspapers and try to explain this.

The Witness: You can understand that, I guess.
Mr. Luciani: I can understand the predicament.
The Witness: Okay.

Q. Did you have any subsequent conversations with Mr. Kaplan? A. No. He—he called one—I don't know whether he called me. He called Anne, one of the ladies that worked there, and told—

Q. Ann Rhoades? A. Yes.

—and told her that he remembers me coming in on Saturday for coffee and stopping at the Madison Agency.

Q. Is that, in fact, true? (35) A. Yes; I did go in there on some Saturdays.

Q. Why did he call Ann Rhoades; do you know? A. I don't know. You know, Annie is a very excitable lady, and she has been a very good friend of mine over the years and was very close, and I guess she didn't want to see them picking on me and, you know, this type of thing. She was very close. I don't know what the situation was.

Q. Did you have any conversation with Ann Rhoades concerning this investigation? A. Annie would constantly call me on the phone and I would tell Annie one very simple statement on the phone: "Annie, tell the truth at all times"; and that is what I stuck with with Annie.

Q. And you said you had had no conversations with Mr. Safran, at all? A. No, not for a long time. I don't know the exact date, but not for a long time. He has moved out.

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Q. Okay. Now, without necessitating going through each and every file and each and every piece of paper, can you tell us, first, how long it took to put all of those files together? A. A few days, I guess. A few days.

Q. And during— A. I had a tremendous knowledge of the properties involved because I know the properties and know of them and, you (36) know, had visited the properties, so I had knowledge of them.

Q. During the course of those few days, you and Mr. Safran had several communications? A. Yes.

Q. Did you, at any time, sit down together and work— A. Yes.

Q. —you having the white pad and he having the yellow pad? A. Yes.

Q. Where did you get the—I show you what is marked as State Grand Jury Exhibit No. 20. A. He supplied them to me.

Q. This will sound like a strange question, but did you have any conversation concerning the use of pencils and pen and different forms of paper? A. Yes.

Q. Can you outline that for the Grand Jury, please? A. You know, I really don't know the exact form of the conversation, but it would be like which was easier to trace or how could you know whether this was a year old or two years old or something along those lines, and it was decided upon to use pencil.

Q. Mostly pencil? A. Yes.

Q. Did you ever, prior to this time, receive anything in the (37) mail from Mr. Safran that wasn't typewritten? A. You know, I don't know. I may have received some hand notes in the mail from him, yes. I really don't know. I can't answer that question honestly.

Q. Do you know Jesse Vertun? A. I know of him.

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Q. You haven't any conversations with him? A. No.

Q. Has anybody told you that stories to "support" your version of the story were being prepared? A. No.

Q. Did you have any conversations with anyone, other than the people you have outlined, concerning this case? A. Just my immediate family. My wife.

Q. And, of course, you discussed it with your attorney, and we are not interested in that. A. Yes.

Mr. Luciani: Would you step down, please.

The Witness: Surely.

(Whereupon the witness left the Grand Jury Room.)

Statement of Joseph S. Portash Taken on February 5, 1975

MONMOUTH COUNTY COURT HOUSE
FREEHOLD, NEW JERSEY

Wednesday, February 5, 1975

STATEMENT OF:

JOSEPH S. PORTASH,

Taken by:

ALFRED J. LUCIANI, ESQ.,
Deputy Attorney General

In the Presence of:

JAMES T. DOWD, ESQ.,
Attorney for Joseph S. Portash

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(2) WEDNESDAY, FEBRUARY 5, 1975

(The statement is commenced at 4:11 p.m.)

JOSEPH S. PORTASH, sworn.

By Mr. Luciani:

Q. Mr. Portash, I call your attention to April of 1971. Would you indicate for us how you first became associated with Madison Agency? A. I was approached by Donald Safran to try to engage me to work as a Planning Consultant, Site Evaluation Consultant for the Firm of the Madison Agency in Lakewood.

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Q. Did you accept his first offer? A. No, No. I—I was asked a couple of times within a period of two weeks and probably accepted either the third or fourth week after he had talked to me initially.

Q. What was the nature of his offer? A. His offer originally was $300 per week and the offer consisted of site evaluations, zoning evaluations, land evaluations.

Q. Did you seek any advice before accepting the position? A. Yes. I contacted Morton C. Steinberg initially and asked Morton C. Steinberg if there would be any problems in that position. Morton C. Steinberg intially told me, I (3) believe even by letter the first time, that as long as I didn't engage in any employment of any project in the Township or in the County it would not be a problem. The second time that he spoke with me Morton C. Steinberg, he amended that and stated that, "Well, based upon your position it would only apply to work of that Agency directly in the Township. So as long as you didn't do work in the Township you could do it in the County."

Q. All right. When you accepted the position did you accept it in good faith expecting to actually work for an earned living? A. Yes. I was very—I was very happy about getting the position. I wanted the position and needed the money.

Q. Did you expect to work for the money? A. Yes.

Q. Did you know at that time when you originally accepted the offer that Mr. Schmertz had an interest in Madison Agency? A. No, not initially. I didn't know until about two weeks later.

Mr. Dowd: Off the record.

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(A discussion takes place between Mr. Luciani and Mr. Dowd which is off the record.)

Q. At the time of your original negotiations with Mr. Safran in connection with this consultant's job, did you (4) plan a vacation home? A. Yes.

Q. Would you explain that please? A. I was in the process of building a vacation home in Maine and at the time I took the job I told him that I really needed the money and would use that to build the vacation home in Maine.

Q. Did you inform Mr. Safran that you would have to borrow money to build? A. Yes, yes, I did. I also—I borrowed money from the—at that time it was the Lakewood Trust Company. It is now the First National State Bank. I also sold a parcel of property that my wife had owned since 1951 in Harvey Cedars. That along with an advance in salary I paid for the home.

Q. When you indicated to Mr. Safran that you intended to build a vacation home did you also indicate that you expected to borrow additional monies to construct it? A. Yes.

Q. Did he offer an alternative? A. Yes. He said, "Before you—before you borrow any money let me see if I can't work out an advance in salary."

Q. Was the idea of the advance his or yours? A. His.

Q. Are you certain of that? A. Yes.

(5) Q. He said, "Let me see if I could work out an advance"? A. "Let me see if I can work out an advance in salary." And he said, "I will be back in touch with you in a week or so."

I waited. He then got back to me after a week or so and stated to me that, "I can work it out, but I have got

Statement of Joseph S. Portash Taken on February 5, 1975

to give you—I have got to give you the checks out of another Company."

Q. Checks for the advance this is? A. Yeah, the checks for the advance. I stated that I couldn't do that.

Q. Did he mention the amount of the advance first? A. I don't know whether—you know, I was talking in terms of about $15,000 because I had mentioned to him what I was short, $15,000, of going for a mortgage and, um, that's how it was. Wait a minute. He stated to me, "Oh, rather than go for the mortgage maybe I can work out an advance in salary." That was the exact wording that he used.

Q. Was he certain he could work out an advance? A. No. He said—he said, "I'll see if I can work out the advance in salary.

Q. And how long after that did he come back to you? A. About two weeks.

Q. And what was the arrangement, if any, that he (6) arrived at? A. Well, he said he could work out an advance in salary. However, the checks would come from another Company that he was affiliated with.

Q. Did he say the name of the Company? A. No, he didn't. I told him that I just couldn't accept any checks from another Company. I think that would, you know—at that time I said to him, I said—I really don't know the exact words I said to him, but in by heart I felt, you know, that that was—it wasn't a thing that I wanted to do.

Q. Did he immediately say, "Well, okay, we can work it out"? A. No.

Q. What did he do? A. No, no. He said then that, "Well, look, I have got to see whether I can work that type of an advance on your 1900"—I guess it was the 1973

salary. "Give me some time. I have got to see whether I can work it out and can afford it in my Company."

Q. Did he ultimately come back? A. Yes, he did.

Q. What did he say? A. He said, "I can work it out. I have had some good success in the last couple weeks. We sold some properties. (7) I have got some money coming in, some money owed to me and I can work it out."

And I said, "Gee, that would really be great and you'd help me out of a jam."

Q. You began work about July 1st, 1971? A. Yeah. I think I was going away then for the 4th of July weekend for a week or so or two weeks and, I don't know, in that period. But then I started about three weeks to a month after that and the first couple of months I did work. I got valuations. I was going along and, then, ugh, it stopped.

Q. Suddenly? A. Pretty abruptly, yes.

Q. Were there any explanations? A. Well, he started to say about—well, I started to say to him about the political season, you know, and I started getting in—I think I was running for Freeholder at that time in 1900—1971 or I was involved in somebody else's election. I guess I was running. Let's see. '71.

Q. Did he suggest that you should sever your employment with him because of your time pressures? A. No, no, no. We had talked. He said, "Look, I can carry you for a few months, you know, while you are busy, engaged in politics and during the Christmas holidays and no problem at all and when you get back you can make it up." He (8) said, "You know, your value is worth it."

Q. I call your attention to January of 1972. Did you begin work for Madison Agency? A. No. I called there numerous times through my secretary at the County—she can verify the calls—and, um, tried to set up meetings with him and lunches regarding some additional work and he was very busy at that time. And he said, "Look, um, I'm very busy. I'm out. I really have nothing. As soon as I get something in I will give it to you. Just hold tight for a while. And, look, you are a consultatnt. Just stay tight. When I need you I will call you."

Q. Did you begin to develop a feeling about your relationship with Madison Agency? A. Yes, I did. I discussed with—also with my wife and we had started to discuss this and my wife kept saying to me, "There should be some work being done for this money and that you should constantly call him and get some work, because if there is no work being done for this it is not a good situation."

Q. What did she say? Did she use a phrase in describing it? A. She said, "You are not earning the money."

Q. Did she mention the fact that you were being used? A. I don't—I don't know whether she mentioned—I—um—I guess you have the impression, you know. I can't (9) say honestly whether she said, "You are being used." She just kept saying to me, "It is your responsibility and your obligation to go there and get this work and do it. That is your responsibility and your obligation, or else you are going to get in difficulty."

Q. And this is three, four, five months after the work suddenly stopped? A. Yes.

Q. And this is about the time that Leisure Technology introduced an application for utility franchises? A. Yes.

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Q. During the course of the negotiations with the Utilities Authority, which you were a member of, and Leisure Technology did the original application run into any difficulty? A. Yes. I guess it was in 1970 or '71 early that they had—by "they" I mean Leisure Village had met with the Township Governing Body requesting that they were coming into the Township to develop in Manchester Township. They at that time asked along with other things—they asked of course for a condominium ordinance because they were developing according to condominium law which the State of New Jersey had adopted. They asked for a franchise for sewerage. At that meeting and subsequent public meetings the Township of Manchester, all Township Committeemen agreed to give Leisure Village a franchise for public water and public sewerage.

(10) Q. Okay. For the sake of expedieney, the Utilities Authority was established some time after that? A. Yes.

Q. And their regulations precluded the issuance of such franchises? A. That's correct.

Q. Now, during the course of the negotiations between Leisure Technology and the Utilities Commission was there a meeting at which the representatives from Leisure Technology requested compliance with the original position of the Township? A. Yes. They requested a meeting, an accommodation meeting with the Township Governing Body, with the Utilities Authority and all attorneys and they stated at this meeting that Manchester Township was not backing down on its original agreement. They threatened to take us to Court. They publicly asked me in front of this—

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Q. You specifically? A. Yes. As spokesman I am Mayor for the Township. Asked me whether the Township had committed a commitment of a franchise. I said, "Yes, we had committed a commitment of a franchise; however, the lawyer, after the Utilities Authority was created, had told us it was impossible to give the franchise from the Municipal Utilities Authority because it was impossible."

Q. The legal reason isn't important at this point in (11) time. A. All right.

Q. During the course of that meeting who was it that called upon you to state publicly the prior commitment? A. I think it was—it was either Mr. Halleran or Mr. Schmertz. I don't know which one. I think it was Mr. Halleran.

Q. And what was your feeling when you were asked to do this? A. Well, I felt, you know, it was a very awkward postition to be in. However, the agreement was public. We had nothing to hide about the agreement and I publicly stated that, yes, the Township Governing Body had publicly agreed to issue Leisure Village a franchise if Leisure Village would move into our community and I stated that publicly and henceforth put it out into the newspapers and announced it at a public Township meeting that, yes, the Township did have an agreement; we were going to be threatened with a law suit because the Township did back off on that agreement.

Q. Sometime after that meeting did you meet Mr. Giordano and Mr. Schmertz at a bank board meeting? A. Yes.

Q. Would you explain that encounter? A. I think it was after one of the bank board meetings they were very,

um, adamant about the fact that the Township (12) had gone back on their word on the Leisure Village Corporation; that they had a sizeable investment in the Township and they predicated that investment on a good will agreement by the Township of Manchester.

Q. What did they say about you? A. They said—me? "You had stated that publicly that that franchise was committed and, ugh, we want that franchise issued by the Municipal Utilities Authority."

I stated that I—I couldn't do that.

Q. Did they say anything about your ability to control your own Town? A. They stated that, "Evidently you can't, you know, control your own Town."

And I said, "There is nothing that I can do in that area. It's against the law."

Q. Did they say anything about you putting them in a bad position? A. Yes. They said they had invested a considerable amount of money in the Township and that it was a very awkward position for them to be in.

Q. About that point in time did you correlate in your own mind your employment at Madison Agency and the lack of work thereat and this application then pending before the Utilities Authority? A. I felt, yes, there was—you know, I just felt— (13) I don't know how to describe it.

I just had a very awkward feeling that, you know, that maybe I was being used.

Q. Did you react by again calling Mr. Safran and requesting work? A. Yes. I called him for the next few days. I don't know whether I got through or not. He was out of Town. I got—once I got through he was out in his airplane some place. I left messages each day and then he finally came back. I met with him on the—I guess

it was somewheres around Lakewood on the corner of Route 9 and Route 70 and told him the urgency of having additional work. He assured me that the work was coming and that he was very busy at this particular time.

Q. Would you say that he placated you? A. Yes, he did. I was satisfied with his answer at that time.

Q. Sometime around August of 1972 representatives of Leisure Technology suggested an alternatives to the actual award of the franchise and, in short, it was simply that the Utility Authority take no position and allow Leisure Technology to apply to the PUC? A. That wasn't the first alternative. The first alternative was the suggestion that they were going to turn this over to the residents of Leisure Village and have a public (14) corporation of the residents.

Q. Was that rejected? A. No. That was treated very favorable. However, I think the lawyer stated that that was impossible to do.

Q. Okay. A. Although there was a bill pending in the Legislature by a Senator to do this at that time.

Q. And the second alternative was? A. The second alternative was to, ugh, rather than institute an immediate law suit by Leisure Village versus the Township of Manchester and the Utilities Authority, to allow Leisure Village to go to the PUC and ask the PUC to issue the franchise and have the municipality neither reject nor affirm the application before the PUC.

Q. Okay. Now, again referring to your personal situation as opposed to your official position as Mayor of Manchester and the fact that there had been that prior representation by the Township Committee, what was your feeling about that suggestion? A. As far as my personal situation?

Q. Yes. A. Well, my personal situation I guess was relief, because it—you know, it took me out of a very awkward—really an awkward position of having—

Q. What was the awkward position? (15) A. Well, of having promised and then not living up to the promise by the Township was the awkward position. But also, you know—I—I don't know what—it was like feeling that you were obligated and then, you know, you just couldn't do it.

Q. Obligated to whom? A. Obligated to the corporation.

Q. Why? A. Because of the employment with Madison Agency.

Q. Now, can you say that your decision to support that resolution of non-opposition was in any way influenced by the awkward position, as you characterized it? A. I believe in the awarding of that franchise to Leisure Village. I believed that as an individual that the Township owed that franchise to Leisure Village and when I voted on that I voted with that belief, that the Township owed that franchise to Leisure Village by commitment.

Of course, it relieved my personal situation, but that wasn't the prime—you know, the prime thing.

Q. But it was a contributing factor? A. But it was a contributing factor.

Q. Would you characterize it as a solution that got you out of the middle? A. Well, alleviated the solution, right. It got me out of the middle, yes.

(16) Q. Sometime after that the original investigation began. Did Mr. Safran ever make contact with you immediately after that original investigation began? A. Yes, yes. Are you referring to the meeting?

Q. Yeah. A. At the lawyers'?

Q. Describe the conversation and how it came to pass that a meeting occurred. A. Well, he called me. He called me on the 'phone and said that he had arranged a meeting over in the, um, Middletown Law Offices of Giordano and Halleran, would I please come alone.

Q. Did he say, "would you please come alone"? A. Yes, he did.

Q. Or was it more like an order? A. No. He said would I please come alone and he offered to pick me up in his car. I said, no, I'd rather drive over there and, um, I did not say to him that I was going to seek Counsel.

I then called up my lifelong friend, Solicitor Morton C. Steinberg and I asked to go over to see Morton and I explained what the situation to Morton was and I asked—

Q. At that time did you tell Morton that you did perform work? A. No, no. I hadn't told Morton anything. And I (17) asked Morton to come over with me and just to protect my interests.

Q. Why did you seek Mr. Steinberg's company? A. I trusted Mr. Steinberg and felt that going in there without the benefit of someone there on my side would have been very, very foolish.

Q. Why? A. I started to think that this thing could develop where, you know, that maybe I was going to be left like holding the bag or something and that is when I sought his advice.

Q. Did your past experience by virtue of your employment in the Madison Agency contribute to that belief? A. Surely.

Q. Did you believe at that point in time that you were duped into entering into this agreement, the employment agreement? A. I don't know whether I believed I was

duped into it or I started to say to myself that I really wanted to make extra money and I just falsely maybe said to myself, "Well, here is a good way to make extra money legitimately and honestly, and, you know, thinking, knowing I was wrong but think I was right.

Q. That's when you first began? A. Yes.

Q. Okay. At the meeting in Middletown did anybody (18) say anything to you when you arrived with Mr. Steinberg about the fact that you arrived with Mr. Steinberg? A. No. No, it was not mentioned.

Q. When you arrived did the meeting begin immediately? A. No. We had to wait a considerable length of time out in the anteroom.

Q. How long? A. Fifteen, twenty, twenty five minutes.

Q. During the time you waited were you and Mr. Steinberg accompanied by anyone? A. I think Mr. Giordano's secretary or somebody come out and said, "You will be a short time," and that's it. We weren't accompanied by anybody.

Q. Did anybody come in after you? A. No.

Q. When you went into the— A. Through that door. That was the front door. I don't know whether—

Q. When you went into the meeting room who was there? A. Oh, Mr. Giordano, Mr. Halleran, Mr. Schmertz, Mr. Safran.

Q. Who began the discussion? A. Mr. Safran.

Q. And what did he do? Did he summarize the situation? A. He went into the employment thing of what I was (19) making, the salary, what amount of work was done for it.

Q. Did he specify in plain and simple language that you had not done ninety percent of the work? A. Yes.

Q. That in fact the work that was involved couldn't justify— A. Well, he stated that he was very busy and we just neglected, you know, to get around to this and that he has been out of town quite a bit and Mr. Portash was involved in the election; and just through this type of commitment by both of us a great amount of this work was not done.

Q. Did he offer any explanation at that time for the staggered salary payments in the year of 1972? A. No, no.

Q. What was said in response to his description of the work that you had done in relation to the money that you earned? A. Well, I think what come out of it was I think Mr. Giordano had said that—this—I'm trying to use his exact words or trying to use some of that—"This looks very bad. There was not substantial work done for that particular amount of payment and there should be statistical records of the work for this payment."

Q. But that was after Mr. Safran said that you hadn't done— (20) A. Yes.

Q. What? A. Hadn't done the majority of the work because we were busy.

Now, you know, I don't want to be held down to the exact wording of that statement. You know, that's what the meaning was. I don't know if those are the exact words or not, but that was the meaning.

Q. Whose meaning, Safran's or Giordano's? A. No. Giordano's.

Q. What was the meaning to you? What was the message? A. The meaning was that the work was not there in the files; that was the meaning.

Q. And what was the instruction or the counseling? A. There should be work records in those files substantiating the employment.

Q. At the time he said to substantiate the employment he well knew that you hadn't done sufficient work in reality to justify the salary? A. I brought up the fact of the planning records that I had and stated that I would reconstruct the—reconstruct the record on the planning records.

Q. During the course of that meeting when you were discussing the type of jobs and what type of papers would be included in those records, did Mr. Safran indicate what jobs (21) would be— A. No. The type of jobs and the papers were not discussed at that meeting. The type of jobs and the papers were discussed just with Mr. Safran and myself. They were not discussed at that meeting.

Q. Was it at that time that he said that the particular jobs have to be chosen with care? A. Yes. And he stated that he would—he would choose those jobs and then I reconstructed on the ones that were actually done and he come back with a list and the timetables of the jobs and the records were reconstructed.

Q. Reconstructed or constructed? A. Some were reconstructed and some were constructed.

Mr. Luciani: Off the record.

(A discussion takes place between Mr. Luciani and Mr. Dowd which is off the record.)

Mr. Luciani: Back on the record.

Q. On your way from leaving Mr. Giordano's office after the meeting you described, were you with Mr. Steinberg? A. Yes.

Q. Did you have any discussion with Mr. Steinberg? A. Yes.

Q. What did he say? A. He advised me that I should immedately resign from that employment and I should seek Counsel and I should (22) also immediately pay back that advancement of salary.

I, um, called up Safran and asked Safran that I had been advised to pay back the advancement of salary, "which even though I can't afford it right now I'm going to do it." And, um, I asked him who should I make the checks out to or what should I do. Then I didn't hear anything from him and, um, then—

Q. He didn't answer you right away? A. He didn't answer me, no.

Q. What did he say, "Wait, I'll get back to you"? A. I don't know whether he had a lot of problems. He just seemed very vague on the 'phone and he wouldn't talk. He said, "I'll call you."

Then I didn't hear from him. Then I found out that he had gone out of town or something, gone to Miami.

Q. There must have been a substantial period of time between that 'phone call to Safran and when you heard he had gone out of town. A. Yeah. I don't know what the date was. I had to raise $500 on the initial payment so I was saving the money to raise that. So then—

Q. Who came up with the $500 figure? A. Well, I did. I called then. I called Mr. Giordano and I said to Mr. Giordano that, "You know, I don't know who to make this check out to. Safran is no longer here. I guess (23) Madison Agency was sold or something."

And Mr. Giordano said to make the check out to—I guess I made it out to Mr. Giordano. I have a copy of the check. It's either Mr. Giordano or the Madison Agency in care of Giordano, because he says he was trustees for the corporation or something. And that is

who I made the check out to and sent it off. Then I sent another one for $250. One of them was cashed and I have the receipt. The other one was not cashed and I don't have the check and it was never sent through the bank.

Q. They both were sent to Mr. Giordano? A. Yes.

Q. On the way back from the meeting again with Mr. Steinberg, did Mr. Steinberg have any discussion about the fact that you revealed for the first time that you really didn't do any work for the salary? A. Yes.

Q. What did he say? A. He stated that I was in, you know, a very serious position, that that shouldn't have been done and that I should immediately try to get legal advice and legal counsel, "because if the State is investigating this thing, you know, you should be truthful and get yourself a legal counsel, criminal lawyer."

Q. Did he volunteer his services? A. No. He said he wasn't qualified, that I would need (24) a criminal lawyer.

Q. Did he indicate that he wanted to assist you in the preparation of the files? A. No.

(Mr. Dowd is called into Court and the Statement is temporarily interrupted at 4:45 p.m.)

(The Statement is resumed at 5:08 p.m.)

By Mr. Luciani:

Q. Did he say anything about the preparation of the files? A. No.

Q. Did he offer any advice as to the preparation of the files? A. Nope.

Q. Did he indicate to you that he didn't want to be a part of it? This is Morton Steinberg on the way back from the meeting. A. He said he could not in any way, shape or form get involved. He advised me to get a criminal attorney immediately. That was his recommendation, that I just get a criminal attorney and then he told me one thing that I remember very vividly. He told me if I was contacted, to tell the truth, don't start off with any type of a lie.

Q. And in fact did you do that? A. Yes.

(25) Q. That time following when Detective Feldherr visited you in March of 1973, did you in fact volunteer the truth to him? A. When?

Q. This is the incident in your office with the letters, to refresh your recollection. A. I—I had reconstructed letters which he stole, or whatever it was, from the edge of the table.

Q. This is the phony letter explaining the $15,000 with the phony date on it? A. Yeah.

Q. In the course of that conversation you did not tell him the entire truth? A. No, no, I did not.

Q. In fact, you relied— A. I relied upon the reconstructed records.

Q. And who told you to do that? A. Who told me to do—

Q. Yes. A. Well, that was—

Q. Did you have a conversation with Mr. Safran during the course of the preparation? A. Yes. That was the essence of the reconstruction of the records and that we were fully familiar with those records that were done

and I was--he said, "If you are going (26) to say this about the record I would say this," so that our stories coincided.

Q. Stories to whom? A. To the investigator.

Mr. Luciani: Off the record.

(A discussion takes place between Mr. Luciani and Mr. Dowd which is off the record.)

Mr. Luciani: That concludes the Statement Thank you.

(The Statement is concluded at 5:16 p.m.)

* * *

I, ROBERT E. ROSTOFF, Official Court Reporter and Notary Public of the State of New Jersey, certify the foregoing transcript.

Robert E. Rostoff, C.S.R.
Official Court Reporter

Transcript of Motions In Camera, December 15, 1975

STATE OF NEW JERSEY

OCEAN COUNTY CRIMINAL COURT

INDICTMENT No. SGJ-27-75-10

STATE OF NEW JERSEY

vs.

JOSEPH S. PORTASH,

Defendant.

Toms River, New Jersey

December 15, 1975

Before:

HONORABLE WILLIAM E. O'CONNOR, JR., J.S.C.

Appearances:

WILLIAM F. HYLAND, Attorney General,
By: ALFRED J. LUCIANI, ESQ., Deputy Attorney General.
G. MICHAEL BROWN, ESQ., Deputy Attorney General.
For the State.

JAMES T. DOWD, ESQ.,
For the Defendant.

(3) The Court: For the record, this is the matter of State of New Jersey versus Joseph S. Portash, Defendant, the Superior Court, Law Division, Docket No. SGJ-27-75-10. Mr. Portash's counsel, Mr. Dowd, has moved before the Court today for a Bill of Particulars and, alternatively, to dismiss Counts II, III, and IV of the indictment. Mr. Dowd's accompanying letter requested that the Court conduct these proceedings in camera. I have called to counsel's attention the provisions of the Court rule which requires that all proceedings, including motions, must be conducted in open court. The Court has called counsel's attention to the provisions of Rule, I believe it is 1:22, that permits the Court to hear such motions in chambers, provided that it be established to the satisfaction of the Court that an injustice would result if the matters were heard in open court, in accordance with the rule. Mr. Dowd, you may be heard, sir.

Mr. Dowd: Thank you, Judge. May it please the Court, Your Honor, we have pending before the Court this morning the motions that the Court has referred to. The Court has the brief of the Defendant, with the request for an in camera hearing and the impounding of the pleadings of these motions, pretrial pleadings, and any exhibits that are submitted by the parties. (4) Your Honor, recently we have been advised by the Court—

The Court: For the record—may I interrupt—I understand that the Deputy Attorney General has no objection to these matters being heard in camera.

Mr. Brown: That is correct, Your Honor. There is one correction we have to make on the record, I think, Judge. You referred to Counts II, III and IV of the indictment. It is a two-count indictment, State Grand Jury Indictment 23-75-10. I believe the motions are addressed to Count I and Count II of that two-count indictment.

The Court: Yes, sir. I acknowledged the error.

Mr. Brown: We have no objection to Mr. Dowd's application.

The Court: All right, Mr. Dowd, you may be heard.

Mr. Dowd: Thank you, Judge. And recently, Judge, within the last several weeks, we have been advised that the Court has scheduled the trial of this matter for January 5, 1976. Today is December the 15th, 1975. In less than one month's time, should our motions to dismiss be denied, a petit jury will be selected from the peers of Mr. Portash of the community of Ocean County. Your Honor, there is a very serious issue before the Court, soon to be submitted in evidence, of (5) the question of immunity of certain statements given by Mr. Portash, including certain testimony taken before the statewide Grand Jury. It is my judgment, Judge, that should these statements and Grand Jury testimony be made a public record, and any discussion or argument about same be picked up by the press, that they will be inflammatory and will be dispersed throughout this community, making it practically impossible to select a jury who is not aware of their existence, and I think they will highly prejudice the Defendant.

Your Honor, from your experience on the bench here to take judicial notice, the Asbury Park Press has a great circulation, as well as several other papers in this community. And because the time of the trial is less than a month from the time of these disclosures, I don't think the history of passing will permit their fresh impact on the public mind. I think it will make it difficult, for the State as well as for the defense, to select a jury. Because we as a defense, Your Honor, claim an immunity, these

statements at this posture and any fruits therefrom are not competent evidence to go before a jury. And if they are exposed to public light at this time, they will be outside of the judicial process, being revealed to those persons who will be or may be available for jury duty. My client is here (6) present, Your Honor. He has been explained his right to an open court hearing, and he joins with me that at this stage it be kept in camera to present polluting the pure springs of a jury selection on his behalf.

The Court: Thank you, sir. Does either Deputy Attorney General care to comment?

Mr. Brown: No, Your Honor.

Mr. Luciani: No, Your Honor.

The Court: Mr. Dowd omitted to mention that the Defendant in this case is a high county public official who has in the past—and the Court takes judicial notice of it —been subject to much publicity concerning matters arising out of his office. The Court feels that the interest of justice would best be served by having this hearing in camera and the record and transcript of the same impounded until the trial is over.

Now, the Court has before it a motion for a Bill of Particulars and a motion to dismiss Counts I and II of the indictment. I will take them in the order that they should be handled.

Counsel contends that the indictment should be dismissed for improprieties occurring in the Grand Jury process. Counsel contends that the minutes disclose—or the transcript, rather, discloses that on April 24, (7) 1974, the transcript recites: "Mr. Luciani and the Foreman were sworn by the Deputy Foreman and hereafter read the aforesaid testimony, Mr. Luciani reading the questions and the Foreman reading the answers." Counsel has referred to Rule 3:6-4, covering the duties of the Foreman

of the Grand Jury, which rule states: "The Foreman shall have power to administer oaths and shall endorse all indictments. During the absence of the Foreman, the Deputy Foreman shall act as Foreman."

Counsel contends in his brief that the indictment is defective because the witness was sworn by the Deputy Foreman rather than the Foreman. The Court notes that no case law citations have been revealed to the Court in reliance upon that particular motion. You may be heard, Mr. Dowd.

Mr. Dowd: Your Honor, my review indicates that there is no case law that I can find on this point, so I am relying specifically on the rules that are mandatory. Your Honor, I'd like to refer the Court, as a preface to my remarks, to the rules of evidence. Rule 18, and I quote it, Judge, that's at Page 63, Your Honor, of the 1972 edition, New Jersey Rules of Evidence. It says: "A witness before testifying shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided (8) by the law." It goes on to say, "No witness may be barred from testifying because of religion or lack of it." Your Honor, We recognize that Grand Jury proceedings have a wider scope in the admissibility of evidence. But we do recognize that the Grand Jury proceedings are an adjunct and arm of the court—these are basic premises, Your Honor—and that their conduct is controlled by the courts. And the rule says—that's Rule 3:6-4 that we referred to, Your Honor—the duties of the Foreman and—Grand Jury Foreman and Deputy Foreman, the Foreman shall have the power to administer oaths, shall enforce all indictments.

So at that posture, Judge, a witness who shall testify under an oath can be sworn in by one person as the

Foreman. There is an alternative situation provided for by the rule. That is that in the absence, during the absence of the Foreman, the Deputy acts as Foreman. The Deputy's authority is contingent upon the absence of the Foreman. In this case, Your Honor, the record reflects that the Deputy Foreman acted without authority when he swore in the Deputy Attorney General and the Foreman to give hearsay testimony by reading a prior transcript. Therefore, it was a procedural due process deprivation by my client in the handing down of the indictment, and therefore the indictment should be (9) dismissed. I personally, Judge, have found no case law on this.

The Court: Mr. Luciani.

Mr. Luciani: Your Honor, the State considers the rule and takes note of the rule. However, we feel that the rule is directory in nature, defining the rights and responsibilities of the Grand Jury to provide for contingent circumstances in the absence of a Foreman. But it doesn't pertain to any substantive rights of an accused nor the procedural dignity of the Grand Jury, nor in fact the legal authority to administer an oath. And for these reasons, we feel that such a directory rule, as it does not pertain to the substantive rights of any particular individual, really bears only on the conduct internally of the Grand Jury and not affecting any rights, and therefore it should have no effect on the legal validity of the indictment, it being technical in nature.

The Court: Do you care to respond, Mr. Dowd?

Mr. Dowd: Well, we are discussing the internal operation of the Grand Jury.

The Court: Do you care to reply to Mr. Luciani?

Mr. Dowd: Just briefly. Mr. Luciani says it is an

internal problem. We realize it is an internal (10) problem, but we think it makes it defective, Judge.

The Court: The Court notes an annotation to N.J.S. 2A:73-4, referring to the case of *State* v. *Garrison,* recorded at 130 N.J.L. at page 350. And the footnote says: "Even though Foreman of Grand Jury, or in his absence one selected by Court, has power to administer oath to witnesses, it is not incumbent that witnesses before Grand Jury be sworn."

So if that case stands for that principle, assuming that an oath were in fact defective, which the Court is not willing to concede, even though the witnesses were not in fact sworn, it would be the Court's opinion that that would not affect the validity of an indictment based upon the testimony of unsworn witnesses; because treating this as Grand Jury misconduct, or as counsel uses the word "impropriety", the Court will agree with the State that that rule is directory in nature and not mandatory, by virtue of the applicable case law, that a Grand Jury may return an indictment on the basis of testimony which has not been sworn to. The Court feels that this would be stretching what possibly may be a procedural imperfection, without conceding that it be a procedural imperfection, to the end that it would defeat the function of the Grand Jury.

So the Court finds that, because of the fact (11) that the Foreman was sworn and the oath was administered by the Deputy Foreman, if the oath were of no consequence or no value whatever, under the Garrison case, then the Grand Jury would be confronted with unsworn testimony, which under the Garrison case is competent to return an indictment. So the Court would deny that motion, Mr. Dowd.

Mr. Dowd: Your Honor, I am following your format as you want to proceed.

The Court: Yes, sir. Your next point would be the indictment should be dismissed, or in the alternative, a hearing granted or, in the further alternative, an adjournment granted; and there you are raising, of course, the concept of witness immunity, and you are asking alternatively that, in view of the Vinegra case, that alternatively the Court should conduct a hearing to determine what evidence if any should be excluded at trial, if your first motion is denied.

Are you prepared to argue that, sir?

Mr. Dowd: Yes, Your Honor.

The Court: All right. You may be heard.

Mr. Dowd: Your Honor, before I go to the heart of that argument, I think for the Court's edification certain facts which are substantiated (12) ought to lead up to what I am going to say. On November 29, 1974, the Defendant was served a subpoena duces tecum, and—On October 29, '74—I'm going to run through a chronology of dates—the Defendant was served a subpoena duces tecum to appear before a statewide Grand Jury in Trenton. Pursuant to that subpoena, the Defendant appeared on November the 14th, 1974, at which time he exercised his right under the Fifth Amendment not to testify. The hearing was held before Judge Schoch. On the same day, he was ordered to produce certain documents, over his objection again in the Grand Jury, that it was in violation of his Fifth Amendment privilege, that he was responding to an order of the Court. On the same day also, Judge, after that testimony, the Defendant was served a separate second subpoena, and that was a subpoena duces tecum to reappear at a later date, which would be the following week. The following week, on November 14th, pursuant to a subpoena,

the Defendant appeared before the statewide Grand Jury. Without any question in the representation by the Attorney General, Deputy Attorney General, his representative, Mr. Portash was a target of the investigation from the very first subpoena, represented affirmatively by the Attorney General's office. On November 14th, Your Honor, Mr. Portash (13) returned to Trenton in compliance with the subpoena, and an agreement was reached before he went into the Grand Jury room. That agreement is referred to in our documents, Judge, as Exhibit 4. The State was represented by Deputy Attorney General Alfred Luciani, who is present here today. The Defendant was present. He was represented by me as his attorney. The substance of that agreement, Judge—and I won't read it, it is in the exhibit—was that no testimony would be used by the State in any criminal prosecution to which Mr. Portash would testify to. The agreement further said, and I refer to lines 20 through 23 of the third page of Exhibit 4, when the Deputy Attorney General said: "You understand the fact that nothing you are about to testify to can be used against you personally in any subsequent criminal prosecution?"

We are interpreting Exhibit 4, Your Honor, as one of the bases to dismiss the indictment as a contract between the State of New Jersey, represented by competent counsel, and Mr. Portash through his counsel. Our authority for that contractual agreement is *Santobello* v. *New York*, 404 U.S. 257, cited 1971. In that case the Assistant Prosecutor for the executive branch of the government in New York, Your Honor, was held to an agreement they made by the Supreme Court in (14) an out-of-state decision.

Now, moving along in the chronology, Judge, I will come back to the agreement in a moment. On February 5, 1975, Mr. Luciani appeared in the Monmouth County

Courthouse for reasons that I was there on trial before Judge Thomas Yaccarino, for the purpose of taking a statement from Mr. Portash, using my word, to nail down his testimony, in anticipation that he was going to be a witness for the State in the matter of State versus the late Mr. Schmertz, Leisure Technology, and one Safran. That indictment was returned and is presently pending before this Court. On February the 5th, 1975, the very same day, Mr. Portash gave an extended statement, covering all those matters which are discussed therein.

Your Honor, I will submit to the Court the statements so that you may make a factual finding from them. It was the sole purpose of—That statement was the direct result of another trunk of the tree that had grown from the acorn of November 14, 1974, Judge, when the State said, "Nothing will be used against you about what you will testify," and the Defendant began to cooperate with the State, pursuant to his understanding of what was going to occur. After February 5, 1975, additional demands were made upon the Defendant for him (15) to preserve his what we consider already acquired immunity, or to use another expression, for him to preserve the promise that he would not be indicted where he cooperated with the State. Additional demands were made, Your Honor, where the State requested of my client that he give up all employment of a public nature whatsoever, that he enter into a settlement on a pending civil suit which arises out of a theory—out of the circumstances, in the Chancery Division in this jurisdiction. The additional demands, Judge O'Connor, were rejected and considered repugnant by my client. As a result of that rejection on April 24, 1975, the Deputy Attorney General, through hearsay evidence, of testimony of—

The Court: When you say, "As a result of that rejection on April 24th," are you pinpointing the date of the

rejection, or are you connecting it, the April 24th date, with something else?

Mr. Dowd: The April 24th, Judge, is the date that Mr. Portash was indicted.

The Court: I see.

Mr. Dowd: The date of the rejection, Your Honor—Let me correct this. March the 27th, 1975, as alluded to in Mr. Luciani's statement to the Court, the Defendant was given two alternatives, which alternatives (16) incorporated conditions that were not in certain of the preceding conditions that had started the ball rolling. Between March 27th, 1975 and April 24th, the date of the indictment, there was a rejection. In the alternative number one, the State requested that the Defendant cooperate in this case, this case being—I will refer to it, Judge, for the record, as the Schmertz case—the cooperation in any other cases that the Defendant might have any knowledge of, a resignation of his township position with the Town of Manchester, which he was then serving as Mayor. The Defendant ceased, may I add parenthetically, Judge, to be a Freeholder of Ocean County, effective midnight of 1974. In the civil judgment there was a request that it be settled, a judgment seeking some thirty some thousand dollars, for $24,322.00. The second alternative proffered to the Defendant, March 27th, 1975, was that he would cooperate in this case. Cooperation was always a major factor.

The Court: When you say in this case, are you referring to—

Mr. Dowd: Meaning the Schmertz case. There was no indictment, Your Honor, at the time of this suggestion. True cooperation in any other cases, which would mean of any investigatory needs that Mr. Portash (17) might help the government; a resignation from all public posi-

tions. And the significance of that is that Mr. Portash was and is Director of the Pinelands Commission in South Jersey. And the civil judgment, a compromise, an offer of—suggested offer of compromise of $15,000. Mr. Portash's position was that his job at the Pinelands was in no way related to this case, was in no way a part of the agreement reached between the State and himself back on November 14th, 1974, which was contained in the Exhibit 4, Your Honor.

As a result of Mr. Portash's not accepting the additional request, which came from the hierarchy of the Attorney General's office, and/or the Executive Office of the government—because I assume Mr. Luciani was working with authority from someone who is his superior—Mr. Brown was basically just into the case at this time, Judge, preparatory to the trial of the Schmertz case. May I further point out, Your Honor, between or up until the day of the indictment against Mr. Schmertz, my client was interviewed on occasions by the State, preparing him as a witness somewhat anticipating maybe a summer or fall trial on the Schmertz matter. Be that as it may, Your Honor, when he rejected the additional demands, which were made far after November 14, 1974, when he was told that nothing that he testified to or (18) about would be used against him in the criminal prosecution, he was indicted.

Your Honor, you have already heard there were no live witnesses. They merely read some additional testimony from witnesses, and certain documents concerning public minutes, et cetera, were introduced at Grand Jury. Judge, I want to emphatically say, because I may lose the target of my argument here, I am not asking for a dismissal on the basis just of an immunity. Number one, we are saying we made a contract with the State of New Jersey that they would not use any of the evidence that Mr. Portash testified about, that it is obvious if they do not use said evidence, they have no case. This is based upon a review of the testimony between--before the two days of the Grand Jury that indicted Mr. Portash.

The Court: May I interrupt? I note on your point three your argument, summarized, is: "The activity outlined in a Statement of Facts—" I am reading from Page 7 now—"and supported by the exhibits annexed hereto indicate that the Defendant and the State of New Jersey entered into a contract whereby the Defendant was to be given immunity from prosecution in return for his testimony in the case of State v. Schmertz. Pursuant to the doctrine laid down in (19) *Santobello* v. *New York*—" the citation—"the Defendant's contract is enforceable and thus the indictment returned against him should be dismissed."

Are you changing your position, sir?

Mr. Dowd: No, I am not, no. Your Honor, I was looking for what is referred to as the Schmertz indictment.

The Court: The number is in your brief. Did you want to see the indictment itself?

Mr. Dowd: I have a copy: I want to submit it as an exhibit, Judge.

The Court: The Court can take judicial notice of it, counsel. It is SGJ-24-74-2, and it is filed in this County under Rule 9, and the Court is compelled to take judicial notice of it.

Mr. Dowd: Your Honor, after—I will hand it in, because it is factual. Judicial notice is fine, if Your Honor is familiar with it. But Judge, you know it was written that, in Genesis, that in the beginning they took clay and breathed a soul into it. Saying this for the moment—not

to quote the Bible, but I have some facts to go on—it has been a torturous history of mankind, that somewhere along the line they breathed fundamental fairness into the judicial process. That's really what the game is about.

(20) On February the 5th, the day that the statement was taken of Mr.—by Mr. Luciani in the Monmouth County Courthouse of Mr. Portash, Judge, that was the day the Schmertz indictment was returned. If one reviews the contents of that indictment, those Defendants were accused of various crimes involving corruption, to use the generic word, with Mr. Portash. Mr. Portash was not a named defendant. He was not a named conspirator. He gave a statement. He was interviewed by the State. Now, there must have been a reason. They don't act irrationally. I assume they don't, a prima facie presumption that they act rationally.

The Court: A reason for what, Mr. Dowd?

Mr. Dowd: A reason why he was omitted from that indictment. There must have been a reason that he was interviewed by the State's lawyers, preparatory to his trial. They, the State, must have had a rational purpose in mind. Mr. Portash must have had a rational purpose in mind, and God hope I, as the attorney, have some rational purpose in mind. This all goes back to the time of the Grand Jury of November 14th, when he was expressly told it would not be used against him. It was by some higher authority—frankly, to use Mr. Brown's words so often used by hir —somebody said: We (21) have to get more. The "more" was too much. And then the State went back and indicted him.

We say, Your Honor, that we could have prevented ourselves from being before this Court, had we resigned from the Mayorship of Manchester Township on March 27 and paid the State some $23,000, we wouldn't be here. Or

had we resigned on March the 27th or shortly thereafter, from Manchester Township as Mayor, and Executive Director of the Pinelands, saved ourselves some nine, close to $10,000, paid $15,000 to the State coffers, then we would not be indicted. And that is a reflection not upon the gentleman before Your Honor. It is a reflection that the hard and arduous work of bargaining between Mr. Luciani and myself, since October 29th, thereabouts, up until the spring of this year, with the diminishing participation by Mr. Brown because he commenced trial, somebody called a shot and pulled the rug out from under us. I use those words, Judge, with discretion. Had we paid $15,000 and resigned from Mayor of Manchester and resigned as Executive Director of the Pinelands, we would not be indicted. Had we paid an additional $9,000 to $10,000, we could have kept our job as Executive Director of the Pinelands, and Judge O'Connor, not be indicted. Not be indicted, why? What authority does the Attorney (22) General's office have to do that? In what public interest? I would assume their position is: We made a proposition back on November 14th, we wouldn't be doing this. That proposition was buttressed and embellished in February, when we ran all the way to the Monmouth County Courthouse and were taking statements the day Schmertz was indicted to nail down his testimony.

I say, Your Honor, in concluding this point on the contract, under the Santobello doctrine—They may say, "Oh well, it was not an affirmative contract." There was an offer, there was an acceptance, Your Honor. And my client moved and did things in pursuance thereof, which he may not have done—I can't say what history would have done had it gone another way—without those representations. On the basis of that history, Judge, I think the indictment should be dismissed.

The second point, is that—Your Honor, I refer to the Public Employees Statute. And, Your Honor, also on the third point I refer to the *State* v. *Vinegra* case, 134 Super. 432. Judge Crane cited or wrote the opinion of the Appellate Division just this summer. Usually, and I am speaking generally, under the doctrine of Sarcone and some other cases where immunity came in and someone was indicted, I forget where—they use transitional or target of investigatory—(23) well, they all merge, the Fourth and Fifth Amendment—it all merges, Judge, in fundamental fairness. Generally, if there was a remedy, the Court's remedy was to dismiss the indictment, as a deprivation of a Fifth Amendment reason, or as the supervisory authority under the Fourth Amendment of the Federal Constitution. In Vinegra, Judge Crane says that the indictment should not be dismissed, that Your Honor should hold the hearing—as I read Vinegra, Judge—find out if there is any tainted evidence to be used by the State, Your Honor, under this doctrine. We feel that the Vinegra case is going up to the Supreme Court of New Jersey as of the 4th of this month, and it may be overruled by the Supreme Court. I note in Vinegra, Judge, that there is no dissenting opinion; and I can only logically conclude, Judge O'Connor, that the Vinegra case was not taken up by the New Jersey Supreme Court because it must do so where there is a split decision in the Appellate Division, but is taking it up for a reason, either to clarify it, amplify it or to reverse it. And the doctrine of Vinegra, I feel, Judge, is directly related to the immunity issue in this case, though factually, there is some variation. And I think it would be an enormous consumption of time, Judge O'Connor, if we tried this case and the Supreme Court six months from (24) now with the decision either overruled

Vinegra or through its decision gave instructions of how to handle the situation where there is immunity, as to when and what is excluded in the trial. It may be they will say that in a case of this nature, the remedy is in the dismissal. So in the last alternative, if Your Honor does not dismiss on the basis of my arguments, that we have a hearing to—with exact particularization as to witnesses, their testimony, and documentation, we know what is going into this trial. That's all I have on this point, Your Honor.

The Court: All right. Thank you, sir.

Mr. Luciani: I'd like to respond, both factually and substantively, in chronology, of course, for the sake of being easier to follow.

On October 29th, the State did in fact subpoena Mr. Portash for an appearance before the State Grand Jury on November 6. On November 6, Mr. Portash appeared with his attorney, Mr. Dowd, who for the first time, at this point indicated to me that Mr. Portash was in fact reluctant to testify and would claim the Fifth Amendment. Prior to that time, I'd been advised by several personal interviews that Mr. Portash did in fact want to discuss this matter with us. When Mr. Portash appeared, the State considered that the (25) information subpoenaed was desirable, and presented Mr. Portash before Judge Schoch for argument, one of the arguments being the applicability of the Public Employees Act, the Immunity Act. Judge Schoch considered the Act applied pursuant to our arguments, and ordered Mr. Portash to appear before the State Grand Jury, present the documents subpoenaed, and at that point that's what was done. We resubpoenaed Mr. Portash for November 14th, and on November 14th, preliminary to any appearance before the

State Grand Jury, and again considering that the Public Employees Immunity provision justified our act, we indicated on the record in camera the following: "We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury. No representations have been made insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury, a separate Grand Jury from the one Mr. Portash is about to appear before."

On the basis of those representations, Mr. Portash appeared and testified concerning the documents presented a week before. The testimony pertained only (26) to the documents, the preparation, as my recollection serves me —we will certainly make a transcript available—it pertained only to the preparation of the documents, when they were prepared, and how they were prepared, and for what reasons they were prepared. Sometime after that, certainly prior to February 5th, our discussions went into greater detail as to what could be done to dispose of the problems, overall. The problems are, overall, were the particular allegations that were involved in this particular case at this time, involved with several factors. I believe the discussions first took place about two weeks after the November 14th appearance. It was always a prerequisite to all discussions about this "plea bargaining", that Mr. Portash was to resign from his Mayor's position, as that was the center of controversy in this particular case. In addition to that, we would, of course, expect him to cooperate in this particular case. But most importantly, and I believe Mr. Dowd will recall, an interview in Director Boylan's office in which it was explained that Mr. Portash's value to the State pertained to another investigation, not just general investigations, but one in particular involving the Pinelands Environmental Council and a contract with Meridian Engineering. That was the subject of the original discussions about what (27) could be done with this situation. Soon thereafter, discussions about restitution entered the picture, certainly again—well, before the February 5th statement. The subject of restitution centered around the amounts Mr. Portash received for this alleged employment at the Madison Agency, and the justification for the State to take this position with Mr. Portash based on his utility in this investigation and other investigations, and what action we could legitimately take with him, that is, resign and restitution. It was agreed, in my judgment, and I believe Mr. Brown and Mr. Dowd will agree, that resignation from the Mayor's position was the first step, and it was my understanding that that was to be done prior to January 1, 1974—'75, I'm sorry. And that was not done.

We continued discussions, and prior to this, just the evening before the February 5th episode, Mr. Dowd and I had a lengthy discussion on the telephone, at which time Mr. Dowd indicated to me that he could not pay the $24,322 figure that Mr. Dowd mentioned before, it was just too high. And it was just too high, and that he didn't feel that much of a restitution was necessary, given the facts in the case. I discussed the matter with Director Boylan around that time. He indicated that there would be a probable restitution of (28) the differences of dollars and cents, which was all we were differing about at that particular time. At this time, we proceeded with the indictment on the basis of those discussions that evening. We

proceeded with the indictment of the other persons involved, and we held upon any final decision on Mr. Portash until later on. Sometime after the February 5th discussion—and the date escapes me—we had a meeting at the East Orange office of the Attorney General's office, in which, at which Mr. Portash, Mr. Dowd and myself were present. Mr. Brown was not present at this particular meeting. In this particular discussion, we discussed the problem with the money. And at that time, Mr. Portash indicated that the money really wasn't the problem. There were other problems in terms of his resignation and his own mental state and whether or not he could justify doing those things. The negotiations were suspended for some time, I'd say two to three weeks, because of the difficulty. When Mr. Brown and myself pressed Mr. Dowd for a final determination, we finally got together on March 27, 1975 at the East Orange trial office, at which time Mr. Dowd, Mr. Brown and myself discussed the various alternatives that we could live with. Sometime prior to that time, we indicated that if the dollar and cents amount was to be minimized down to $15,000, we would (29) require something in addition, that is, resignation from another public office because of the overtones of the particular transactions here. Otherwise, we would abide by our original representations to accept $24,322. $24,322 was the net amount Mr. Portash received after taxes. We would accept resignation from the Township Committee and Mayor. We would require cooperation in the Pinelands Environmental Council case, and we would expect cooperation in this particular case. The second alternative was added basically because Mr. Dowd vehemently objected to the amount of money, and because of the indications of concern from my superiors about resignation

from one public office and not taking any additional steps with another public office, both involving public trusts. Based upon that, we gave a second alternative on March 27th, that is, cooperation in this case, cooperation in the other investigation, resignation from both positions, and a civil judgment in the amount of $15,000, with conditions for repayment, Mr. Portash through Mr. Dowd rejected both, and I was requested to talk to Mr. Portash directly, and I don't normally do that. I thought it was quite extraordinary, but I acceded to the request of Mr. Dowd, and both Mr. Portash and Mrs. Portash, because of the—

The Court: Who requested you? Was it a (30) hierarchial request from—

Mr. Luciani: No. Mr. Dowd requested me to call Mr. Portash. Mr. Dowd represented to me that Mr. Portash wanted me to discuss the matter directly with him. At the time I called him up, we had a discussion.—I believe that it spanned an hour, an hour to two hours on the telephone. And my recollection—and I don't want to misstate or even implicitly misstate—but the discussion centered around his ability basically to live with himself, and whether or not he was making the right decisions. And we came down to a final determination based on one thing and one thing alone, Your Honor. As I understand it, this was a matter of principle. Mr. Portash was convinced in his own mind that he really hadn't done anything criminal. He felt that a resignation from public office—and I believe the term was "putting his tail between his legs"—was tantamount to an admission of guilt, and he couldn't live with that, and he chose rather to contest the charges, quote, that would be levied against him. Through the entire negotiations, it was clear to everybody that there was always a possibility of lodging the original

charges, that nothing altered that pending final resolution of these problems. Mr. Portash represented and Mrs. Portash indicated very strongly that neither felt that Mr. (31) Portash had done anything wrong, that to pay the money and to resign would be much too much for them to bear in terms of their own self-esteem and stature in the community, and he chose rather to defend on the basis of principle. It wasn't a difference between $24,000 and $15,000. It had nothing really to do with the amount of the money. It had to do with what he chose as what was right for him at that particular time. As a result of that discussion, after I again, I believe, spoke to Mr. Dowd after concluding my discussion with Mr. Portash, I informed them that we would present the matter to the Grand Jury, and that it would be presented in such a way that it would segregate everything that we had before and matters of public record, from anything that we discussed with Mr. Portash and anything that we could have derived, which we didn't, but anything that we could have derived from any discussions with Mr. Portash.

I represent to the Court that all evidence pertaining to this matter was accumulated prior to December 1st of 1974, other than the statement of Mr. Portash on February 5, 1975. While it may have been accumulated—some of the materials involving public record were introduced in the Grand Jury, it may have been at a later time, but these again pertained only to public records of public agencies, such as minutes, (32) opinions of counsel, and the decision of the Public Utilities Commission. And it is on the basis of the fact that we feel that the November 14th representation and, quote, contract, was laid upon the record—and again, I stress that no representations—and I am quoting—"No representations have been made

insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury, a separate Grand Jury from the one Mr. Portash is about to appear before."

Everything that flowed from that, and while that was embellished upon in discussions, it was embellished upon to the extent that if Mr. Portash agreed with our requests on these four different aspects, that we could justify in our own minds taking the extraordinary step of insulating the public office in the case because of his cooperation, not so much in this case, but in a case that could not have been made without his cooperation. And when that fell through—and the reasons it fell through are pretty much as has been stated here—we proceeded with what we considered to be a good faith prosecution.

Mr. Brown: Let me just make a—

The Court: You wish to supplement Mr. Luciani's remarks?

(33) Mr. Brown: Very briefly, Judge. I became involved in the investigation of the subject matter of this indictment against Mr. Portash during January of 1975. My first involvement was the arraignment date of Leisure Technology Corporation and Robert Schmertz and Donald Safran.

Following that initial involvement, I had contact with Mr. Portash on one occasion—on two occasions. First, he and Mr. Dowd came to the East Orange office, I believe in February of 1975, for the purpose of my reviewing with Mr. Portash his anticipated testimony in the trial of State versus Schmertz, et al. On the second occasion, with the agreement and through the suggestion of Mr. Dowd, I met with Mr. Portash at his home. His wife was not present during the conference, but came to the house

in the middle of our conference. And the subject of that conference was his anticipated testimony in the matter of State versus Schmertz, et al. There is some suggestion by Mr. Dowd that there were additional demands placed upon Mr. Portash to preserve, as he says, to preserve the promise that he would not be indicted. I think that is factually incorrect, Your Honor. I think there was never a promise that I was—had any knowledge of directly or indirectly, made to Mr. Portash that he would not be indicted during November (34) through April—November '74 through April 1975. What there was, Your Honor, was an attempt to arrive at a solution of the problems involving Mr. Portash which would avoid an indictment and avoid the necessity of the indictment. So I think the premise that there was a promise not to indict is an incorrect premise. There was a promise before the Grand Jury when Mr. Portash first testified that nothing he said would be used against him in a subsequent criminal prosecution. There were discussions from January through April of 1975. The end of the discussions or the hope of the discussions, was some resolution of the pending information against Mr. Portash, a resolution which would avoid his being indicted. These resolutions involved resignation from certain jobs and the entry into a consent judgment for the return of money paid to Mr. Portash by the Madison Agency. The representations of Mr. Luciani and I as to the joint conferences that were had are correct. These conferences were not plea bargaining conferences, because there was no indictment in effect at the time. These conferences were an attempt by—a sincere attempt—by Mr. Dowd, Mr. Luciani and myself to arrive at a resolution of the pending information against Mr. Portash, without the necessity or the effect of an indictment. My recollection of the facts as to (35) the resig-

nation of the position as Mayor of Manchester Township were that Mr. Portash was—that Mr. Portash was going to resign, I believe, on January 1, 1975. There was a request for an adjournment of that resignation date, agreed to by Mr. Luciani, to February 1, 1975. When there was no resignation forthcoming or no resignation submitted by Mr. Portash, there were inquiries made by our superiors as to why the resignation had not been submitted, and why we represented to our superiors that the resignation would take effect on January 1, 1975, and that a part of our negotiations had not been complied with. There were some telephone conferences which resulted in a meeting held by Mr. Dowd, Mr. Luciani and myself in the East Orange office, on March 27th of 1975, for the purpose of setting forth in writing what the resolution of the pending investigation would be as to Mr. Portash. Mr. Dowd—I believe it was just prior to Easter—Mr. Dowd indicated to Mr. Portash he was going away to a home, I believe in Vermont, for a few days with his family and think it over. When he returned, there was the request, as Mr. Luciani and I stated, that there be a direct contact with Mr. Portash, a request made by Mr. Dowd. Following that direct contact, neither of the proposals which the State had submitted to Mr. Dowd could be or would not be complied (36) with, and it was decided to let the chips fall as they may. And Mr. Luciani and I then obtained transcripts of the evidence that was before the Grand Jury, prior to our contact with Mr. Portash, and presented that evidence to a Grand Jury, which returned the indictment which is the subject matter of this motion.

Those are the facts as I recall them, Judge. I think that the crux of the problem before the Court is the determination as to whether or not there was a contract. There

was no contract to my knowledge. Secondly, whether or not there were additional demands and a promise that he would not be indicted. There was never to my knowledge any promise made to Mr. Portash that he would not be indicted. What there was, there were sincere efforts by the Attorney General and the defense counsel to resolve this investigation against Mr. Portash in a manner which would not include an indictment. Those sincere and timely efforts did not reach a fruition whereby the matter would be disposed of other than by indictment. And the evidence which was pre-existent from our conferences with Mr. Portash was presented to a Grand Jury, and the indictment was returned.

Mr. Luciani: I would add one other thing, Your Honor. In the March 27th, 1975 conference, a (37) written document, a copy of which I have in my hand, culminated from it. And at the bottom of it, apart from the—

The Court: If you are going to refer to it, we better have it marked, Mr. Luciani.

Would you mark it S-1 for identification, please?

(The document was received and marked S-1 for identification.)

Mr. Luciani: And on the bottom of it, in, I believe it is my printing, as to both alternatives, there was a further agreement. It says: Both—no indictment in Pinelands. That refers to the other investigation that we sought Mr. Portash's cooperation on.

The Court: Anything further from the State?

Mr. Brown: No.

The Court: Do you care to respond?

Mr. Dowd: Just briefly, Your Honor, because we are making a record.

In substance, the chronology is somewhat accurate. Judge, in November of 1974—we had explained to the Court—there was compelled testimony plus the agreement on two different occasions by Mr. Portash. That was the germination of the negotiations handled by Mr. Luciani basically as Deputy Attorney (38) General, and myself as defense counsel. And it was generally understood that we would cooperate with the State in whatever way we could. Sometime at the tail end of that year—and I'm not giving specific time, but a month, six weeks later—it was added to the kitty, the pot, a request for a civil economic payment to the State of New Jersey. It had never been in existence ab initio. That happened in the ballpark of January of '75, Judge. It brought a new factor in. While that was being discussed, and hopefully attempting to be ironed out, we found ourselves approaching late winter, early spring, when, Judge O'Connor, the request and the demand became that he resign from the Directorship of the Pinelands. That's the reason in January, when certain things were expected by the additional demands of someone above the level of the Deputy Attorney General's rank, either of them at any time in these negotiations added a request: If you give up the directorship of the Pinelands, you can settle your civil judgment for $9,322 less. Your Honor, as far as the agreements were understood—of course, it is my judgment—we didn't reduce agreements as a contract to buy and sell a house. Your Honor, I think it is implicit in all these negotiations that the State expected Mr. Portash's testimony in State versus Leisure Technology Corporation, et al., and there would (39) be certain other ancillary requests made of him. But the basic fundamental requests to Mr. Portash prior to Mr. Brown, I am sure, ever even seeing this file, back in 1974, before money demands were made, certainly

way before resignations of a Pinelands job were made, Judge O'Connor, were simply to cooperate with us in this case.

Mr. Luciani: Wait just a second.

The Court: I will give you an opportunity to answer, Mr. Luciani. You stated your objection on the record.

You may continue, Mr. Dowd.

Mr. Dowd: Because it was not until sometime later, after the original representations outside of the Grand Jury room on November 14th, 1974, which is in the exhibit four—

The Court: May I interrupt for a question? Under Point 3, you state: "The activity outlined in a statement of facts and supported by the exhibits annexed hereto indicate that the Defendant and the State of New Jersey —" I am reading from Page 7—"entered into a contract whereby the Defendant was to be given immunity from prosecution in return for his testimony in the case of State versus Schmertz, et al. Pursuant to the doctrine laid down in *Santobello* v. *New York*"—the citation—"the Defendant's contract is enforceable and (40) thus the indictment returned against his"—I'm quite sure a typographical error—"him should be dismissed."

You refer to the exhibits, Mr. Dowd. The exhibits, of course, are the subpoena under date of the 29th of October, 1974; the in camera hearing before Judge Schoch on November 6, 1974; the subpoena under date of November 6, 1974; the appearance before the Grand Jury on November 14th, 1974, and the indictment. Now, are you contending that when the Defendant was instructed that he had immunity under the statute as a public employee, a contract thereby was created under the Santobello case, and that anything that was derived from his testimony could not be used as evidence, or are you contending that

subsequent to this initial appearance before the Grand Jury, further negotiations were entered into resulting in what you contend to be another enforceable contract, separate and distinct from the contractual theory you are postulating under the Santobello case?

Mr. Dowd: What I am saying, Judge, is that a contract was entered into.

The Court: Well, if I take your brief at its face value, the only way I can glean a contract is from the exhibits, because that's what you say here: "The activity outlined in a statement of facts and supported (41) by the exhibits annexed hereto indicate" that a contract was entered into. My point is, what contract and where?

Mr. Dowd: That the agreement of 11-14-74 was made, and that those factors, those overt acts, those verbalizations, those interviews, were in substantial compliance with the understanding reached on the 14th. And the statement of facts indicates that there was substantial compliance, Your Honor, with what was the basic understanding of the people involved. I think that Mr. Portash would not be indicted, and that he would be a witness in the other indictment that we referred to as State versus Leisure Technology.

Mr. Brown: Can we just take a recess for a minute?

The Court: Of course, certainly, and the Reporter, of course. We will take a break.

(A luncheon recess was taken, after which the following occurred:)

The Court: Okay. Are there any further arguments with respect to the contract theory advanced by Mr. Dowd?

Mr. Brown: I have none, Your Honor.

The Court: Mr. Dowd?

Mr. Dowd: I think that pretty well covers it.

The Court: I'd like to ask you a couple of (42) questions, if I might. I note—and I took down my notes—you contended there was a promise on the part of the State that the Defendant would not be indicted. I don't find that in the record, and assuming that it be in the record, I am concerned with whether or not a prosecutor —taking into consideration this Grand Jury is a constitutional body—whether or not a prosecutor could commit a Grand Jury to not return an indictment.

Mr. Dowd: Well, in answer to that specific question, Judge, the answer is no. But of course, the prosecutor controls what is presented to the Grand Jury. In here you have—I think it was marked for identification—

The Court: Yes. I haven't read that yet.

Mr. Dowd: —which is a document which indicates that had the Defendant accepted one of two basically financial propositions, it would not have been presented to the Grand Jury. The Grand Jury is somewhat of a contradiction, Judge, in that it is an arm of your court, that is, you the entity of the judiciary.

The Court: Suppose a Grand Jury says, some member of the Grand Jury says, "What's going on down here in this Pinelands? On our own, we want to conduct (43) an investigation on it."

Mr. Dowd: They can do that.

The Court: And they can do that, and suppose the Deputy Attorney General appears and says, "Look, for matters of certain public policy we don't want you to pursue this." And the Foreman of the Grand Jury says, "Look, we feel that we do want to pursue it. In fact, we are going to exclude the Deputy Attorney General and

even the Attorney General. If he applies to be here, we are going to exclude him from our deliberations. We are going to issue our own subpoenas, call our own witnesses," and they turn around and indict? And then under the contract theory, which is the Santobello case, which of course involves plea bargaining, not indictment, I am concerned about the position you are taking with respect to the existence of a valid contract not to be indicted. Can there be such a thing, Mr. Dowd?

Mr. Dowd: I think—and I'm going to use your word "valid," Judge, in the sense of enforceable.

The Court: Yes, sir.

Mr. Dowd: I won't guess as to the sophistry of whether or not it hinges on ultra vires activities, but I say yes, if the target of investigation lessens his position by cooperating in pursuance of that (44) expectation. And I think the Courts, either under the exclusionary type doctrine of the Fourth Amendment, a Miranda type thing where you have supervisory power, say that the only remedy is the enforcement of it by way of a dismissal.

The Court: Would they dismiss or would they turn around under the Blue case, which is what the Vinegra case is bottomed on, that the rule is one of evidence, that the evidence will be suppressed?

Mr. Dowd: Well, there's a few vague cases, Judge, I'm going to answer that this way—

The Court: A reasonable mind can read the two doctrines and come up with an approach that maybe is an evidentiary ruling. On Page—in the case of *State* v. *Vinegra*—the Court does not have the official report—at Page 5 of the slip sheet opinion, the Court states: "In *United States* v. *Blue*, 384 U.S. 251, 1966, the Supreme Court reversed the dismissal of an indictment which was

allegedly based on testimony of a Defendant obtained in violation of his rights against self-incrimination. The Court stated: 'Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at (45) trial.'" And then there is a series of asterisks and a further quotation: "'Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree inference with the public interest in having the guilty brought to book.'"

Now, the Blue case is the genisis for the Appellate Division's decision in Vinegra, and your motion here is directed to the dismissal of the indictment.

Mr. Dowd: May I comment on that, Judge? Judge, the Blue case is a decision based on the rationale of the applicability of the Fourth Amendment.

The Court: Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment—

Mr. Dowd: They are talking about—Blue is talking about the exclusionary rule in a Miranda type thing where your basic, inherent supervisory control over the administration of justice is a judiciary. You can say you should not do this, this is a prophylactic exclusionary rule.

(46) The Court: Miranda being a Fifth Amendment case, compulsory self-incrimination.

Mr. Dowd: Right. And I think that a reasonable mind can argue that you go the route of the exclusionary rule, which you may be bound by now, you the Judge of this

Court, because of Vinegra, if that's the dominating law until the Supreme Court does something.

The Court: That's right.

Mr. Dowd: If that's the hypothesis on which Your Honor is working, that Vinegra is the applicable law today which the trial Judge is controlled with—

The Court: I am bound by it until such time as the Supreme Court reverses it.

Mr. Dowd: Right. If under our propositions of the Defendant having incriminated himself, et cetera, dismissal based on that, I say that the basis of Vinegra is that you have a hearing to see what is excluded from the trial, and we know where the markers are on the ballfield. That portion of our motion is why we couched it in a hearing or, in the alternative, a delay till the Supreme Court rules. That, Judge, is, that very carefully is what we put just on the point of incrimination. But the contract theory, behold, on the Santobello, is a different type doctrine.

(47) The Court: Well, in Santobello, Mr. Dowd, didn't the Supreme Court say this, that if the parties agree to a plea bargaining, then the sentencing Judge must abide by the plea bargain or vacate the plea and have the matter referred to trial? You are not dealing with any dismissal of a complaint or an indictment in Santobello. Santobello says that the Judge should have vacated the plea and proceeded toward trial. The sanctity of the indictment among all the prior proceedings would have been maintained. In effect, what they are doing is directing, under the contract theory, that the Court permit Santobello to vacate his plea; nothing more, nothing less. But it has nothing to do with the validity of the instrumentality or means by which the man went to trial, namely, the indictment.

Mr. Dowd: Factually, yes, but I think doctrine-wise, Judge—

The Court: But look to Vinegra, which is the law of this State right now.

Mr. Dowd: I have to say that—

The Court: Vinegra says: Don't dismiss the indictment, suppress the evidence, equating it with the concept that although Miranda is of constitutional dimensions, Miranda is nothing more than a rule of admission or exclusion, period.

(48) Mr. Dowd: I agree with you, Judge. Now I am concerned we will run the two marbles together. We have Vinegra as a doctrine which is binding on this Court—

The Court: No doubt about it.

Mr. Dowd: —and we have on December 4th, at least in the Law Journal, that the Supreme Court is taking it up; and we know, Judge, and I am repeating from what I said earlier, it is not a split decision in the Appellate Division, so they are taking it up on some merit, and maybe the Court is saying that Vinegra is not the doctrine maybe, Your Honor, and that Sarcone and the other two cases should not be—

The Court: Sarcone and Sibilia.

Mr. Dowd: Maybe they will tell the trial court and defense and prosecuting counsel how we run a format. What do we do procedurally here? Do I have to interrupt every question of the Prosecutor during the trial and become to appear as an obstructing person in the eyes of laymen who really don't understand what objections often are? Could you have a preliminary hearing, like a motion to suppress? And will you try the case and retry it? Do they have a right to put incriminating evidence on this cross examination? As Federal cases indicate, you can in the Miranda type (49) violation—

The Court: Well, do you recall at our conference not on the record, I suggested the utilization of the instrumentality, or the pretrial conference in the criminal case—yes, the State furnished me with the slip sheet. Now, your position as I understand it is, number one, anything that Mr. Portash may have said before the Grand Jury cannot be used against him for several reasons: Number one, the existence of the Public Employees Witness Immunity Act.

Mr. Dowd: Only so far as the State says it is applicable.

The Court: I don't follow you on that.

Mr. Brown: Nor do I.

Mr. Dowd: We don't contend that what he is accused of as—was a violation or a relation to that act, but the State says they are relying upon that act as forcing him to testify. I am capsulizing it, Judge, their reliance upon that act. They take its liabilities as well as its truths. They have acquired something. Therefore, if they are relying upon that act, and there is absolute immunity, I am relying upon the doctrine of a violation of my client's Fifth Amendment rights as a citizen who was compelled to testify against himself and the subsequent statements given thereafter.

(50) The Court: Well, I am missing your point. You are contending that your client occupies a dual status; number one, as a public employee or public official, number two, as a private citizen, separate and distinct from any office or status which he may occupy within the framework of public employment or public office?

Mr. Dowd: Correct. He doesn't become a second-class constitutional citizen by being a public official. He still has the Fifth Amendment right and all the other Bill of Rights rights.

The Court: Yes. He has the Fifth Amendment right, which I gather he chose not to exercise.

Mr. Dowd: He did exercise it.

Mr. Brown: I don't believe he did, Judge.

The Court: If he did—

Mr. Brown: He shouldn't have testified. He wouldn't have testified, if he did.

The Court: If he did, then I wouldn't be—

Mr. Dowd: Your Honor, you don't have before you the exhibits that we are going to introduce.

The Court: Well, I relied on what you submitted when you filed your brief.

Mr. Dowd: May I read—and may I have this marked as—I think I will have several of these (51) marked. Your Honor, I'd like to have marked for identification the testimony of the Grand Jury of November 6th. Mr. Portash—

The Court: Is that included in your—

Mr. Dowd: No, it is not. It is for a supplement of today's hearing, Judge.

The Court: This will be D-1 for identification.

(The testimony was received and marked D-1 for identification.)

Mr. Dowd: On the record, Your Honor, I did not submit these with my brief, Judge, for the reason I didn't know about the in camera impounding. D-2 for identification would be the transcript of testimony before the Grand Jury, the State Grand Jury, under the date of November 14, 1974.

(The testimony is received and marked D-2 for identification.)

Mr. Dowd: And further, statement of Joseph S. Portash, taken by Alfred J. Luciani, Esquire, Deputy Attorney General, on February 6, 1975, at the Monmouth County Courthouse, Freehold, New Jersey.

(The statement was received and marked D-3 for identification.)

The Court: Anything else to be marked, Mr. Dowd?

(52) Mr. Dowd: Not at this time, Your Honor. I first—In answer to your question, the hearing before Judge Schoch, which was the initial hearing of Mr. Portash's indoctrination into this matter—

The Court: This was the attempt to enforce the service of the subpoena duces tecum?

Mr. Dowd: It was a successful attempt. In that hearing, Your Honor, Mr. Luciani represented to Judge Schoch that Mr. Portash was a target of the investigation. Your Honor, at Page 11, Line 25 of our Exhibit 2, it says—the Court, which is Judge Schoch, said: "If he was directed to produce these"—Next page, 12—"documents after he has been advised that he is a target of the investigation, wouldn't he then be in a position if the indictment, if an indictment is returned against him, based on the production of these documents, wouldn't he be in a position to move to quash that indictment because they're using the fruits of this investigation with him as a target?"

The Court: That was pre-Vinegra, of course.

Mr. Dowd: Yes, Your Honor. And then, of course, my response and so forth.

Now, the reason I pointed to that, Judge, is that the State was placed on notice of the perils. What they did—Now, if I may have, Judge, what has been (53) marked

for identification as D-2—D-1, Your Honor—that after the hearing that, Your Honor, I just read from, Judge Schoch, before the Grand Jury, Mr. Portash did appear, and after being sworn: "Question: Mr. Portash, are you here pursuant to subpoena duces tecum, and have you presented documents because Judge Schoch has indicated you must do so; is that correct? Answer: Yes. I have a statement I'd like to read on behalf of that.

"Question: Go right ahead. Answer: Under order of Judge Schoch, I am ordered to appear at this proceeding after his denial of my claim that the information is privileged and may incriminate me. I understand I am the target of an investigation relating to possible criminal conduct in my capacity as Mayor of Manchester, and/or Ocean County—

"Question: I am going to ask you to identify material—"

Et cetera. Mr. Portash's position was that the documents incriminated him. He was ordered by a judge to produce them, not an automatic thing under the statute, but after a hearing before the judge, who said, I order you to produce these, and told the Attorney General: For telling me he is a target, he claims incrimination flows therefrom. You may (54) have a problem.

Now, that's pre-Vinegra. But there is a Fifth Amendment claim here, Judge. What Judge Schoch said in that testimony, Your Honor—and I can't put my finger on the exact portion of it yet—he does touch on the point, supposing a public official is asked to produce records or testimony not in relation to his public position, that the statute says in relation to the public position—Let's assume the dog warden of a community holds up a bank—

The Court: Excuse me. Isn't that in re Addonizio?

Mr. Dowd: In that area, Judge.

The Court: Wasn't he, although he was Mayor of Newark, required to produce his own personal tax returns or bank accounts, I believe? I think that's Addonzio, right on point, 53 N.J. at page 107, in re Addonizio. The syllabus reads: "Grand Jury was charged to investigate allegations of corruption in city government. The Superior Court, Law Division, entered order directing city Mayor to give obedience to subpoena of certain of his personal records and a second order denying motion by Mayor and his wife to set aside Grand Jury subpoenas served on bank and brokerage firm for production of accounts of Mayor and (55) his wife with them. On certification, the Supreme Court, Weintraub, C.J., held that claim of privilege of self-incrimination raised by city Mayor in regard to his personal records during investigation of official corruption in city, when Mayor was target of Grand Jury's investigation, was valid claim and privilege should be upheld.

Order directing Mayor to give obedience to subpoena directed toward his personal records reversed and order denying motion to set aside Grand Jury subpoenas served on bank and brokerage house for production of records of Mayor's accounts affirmed."

Now, I think this antedated the Public Employees Witness Immunity Statute. I'm not sure, but I recall that they did suppress it.

Mr. Dowd: I think as an outgrowth of that decision the statute was promulgated by the legislature.

The Court: Let me ask you a question.

Mr. Dowd: Judge, while we are right on target point, Page 24, Judge, of our Exhibit, in line 11, Judge, through Line 17, Judge Schoch in a colloquy with Mr. Luciani says: "I'm not quarreling with that statement, but what,

it sounded to me like what you're suggesting is that if these documents reveal Mr. Portash's involvement in some crime not related to his (56) office, that he will have immunity from that prosecution for that crime, and I don't think that's the effect of this statute."

The issue here, which I don't know how you can decide—

The Court: What documents were produced before the Grand Jury?

Mr. Dowd: Work records of a corporation for whom Mr. Portash was employed.

The Court: The Madison Agency, you are talking about?

Mr. Dowd: Yes. And they were incriminating, Judge, some of them, some of them.

The Court: Okay.

Mr. Dowd: Now, let's assume—

Mr. Brown: I think we should establish what records were produced by what witness before the Grand Jury. There were records of the Madison Agency produced by, I believe, more than Mr. Portash. Mr. Portash produced certain documents before the Grand Jury that were marked.

Mr. Dowd: You are not talking about duplicitious documents?

The Court: No. I think what Mr. Brown is saying is that the privilege would be delimited to what (57) Mr. Portash had disclosed, assuming the existence of a privilege. If someone else—

Mr. Dowd: I would like that—

The Court: That's what you are trying to say?

Mr. Brown: Yes. It was employment records and bank records and other bookkeeping records that were produced long before the State ever spoke to Mr. Portash.

Mr. Dowd: Let's say it came to pass, Judge, that a public official was subpoenaed to produce records or to give

testimony about something which was unrelated to his capacity as a public official.

The Court: Well, the statute is delimited in its terms, I believe the statute 2A:81-17.2a1: "It shall be the duty of every public employee to appear and testify upon matters directly related to the conduct of his office, position or employment before any court, grand jury or the State Commission of Investigation. Any public employee failing or refusing to so appear and to so testify shall be subject to removal from his office, position or employment."

Then 2A:81-17.2a2 says: "If any public employee testifies before any court, grand jury or the State Commission of Investigation, such testimony and (58) the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution for perjury committed while so testifying."

So actually what you are contending is not what you stated in your brief, but rather—well, I suppose you did cover it, but you covered it in a manner that didn't disclose to me—"The indictment should be dismissed"—and I am reading from Subparagraph B on Page 7—"as the Defendant's testimony before the Grand Jury is protected by the Fifth Amendment, and further, under N.J.S. 2A:81-17.2a2 it is also protected."

Mr. Dowd: Judge, you know—I may sound like I am toying with words, there is a very fine distinction, Judge. The State contends that the employment with Madison was related to payments to Mr. Portash, improper payments, for certain things in relation to his public employment. We say that's not true. This is a factual and elliptical disagreement. We say that the production of

documents, a portion of those produced, which is not before you yet, Judge—

The Court: No, and the Defendant's testimony.

Mr. Dowd: Well, it all comes from this, because we have the three sets of statements, one, two (59) and three marked. It is our contention they are totally unrelated.

The Court: You didn't tell me that in your brief.

Mr. Dowd: Well, that's why we say on the—Well, that's the frame of our position, Judge. We say the Fifth Amendment is applicable and the State, having indicted him by tying in Madison, Judge, under theory of prosecution, with public office, if their theory is correct, then 2A:81-17.2, et cetera, are applicable. We are saying there is no relationship, Judge. But if the State has indicted him for it, and takes the position there is a relationship, then not only is the Fifth Amendment that protects him, which he was forced to surrender for the acquisition of knowledge on their part, but also protection of the statutory mandate. Does that—do I articulate—

The Court: I understand what you are contending now. I was misled when I read your brief. You used the term "testimony". You never referred to exhibits.

Mr. Dowd: Well, the first Grand Jury, Judge, was exhibits and minor testimony.

The Court: Yes.

Mr. Dowd: And the next Grand Jury was Exhibit (60) 2 and the testimony taken at Monmouth County Courthouse, Exhibit 3. They all come from the poisonous seed that was sown on the subpoena duces tecum that he was forced to—

The Court: *Won Sung* v. *United States.*

Mr. Dowd: Right, Judge, and the fruits thereof.

The Court: What's the State's position?

Mr. Brown: Well—

The Court: I understand Mr. Dowd's argument now is, first, the statute does not apply because the statute delimits the testimony to duties relating to the office, that the statute further provides to appear and testify. Testify. Counsel, the way I gather it, his argument now is contending, first, he didn't testify, he was compelled to produce documents. These documents do not pertain to the duties of his office. He didn't want to produce them. He was aware that he was a target, he wanted to invoke the Fifth Amendment privilege against self-incrimination. He was compelled to bring them. Am I stating your position?

Mr. Dowd: Yes, and further ordered—

The Court: Yes. I said he was compelled to produce them.

Mr. Brown: I understand his position. I (61) don't understand the Court's question. I apologize.

The Court: With counsel's contention now, which has been clarified—and I didn't infer that from the brief—would that cause the State to change its position with respect to the State's opposition to this motion to dismiss the indictment, or in the alternative, to suppress?

Mr. Brown: Judge, the State has no intention, as I think was—

The Court: Are you relying—

Mr. Brown: —as was fairly set forth in our letter response, to elicit testimony about documents that Mr. Portash was forced to turn over to the State Grand Jury, or compelled to turn over to the State Grand Jury.

The Court: In other words, your representation is, you do not intend to use any such material—

Mr. Brown: —that came from Mr. Portash, that's correct, Your Honor. There was a position taken by Mr.

Luciani, before the hearing with Judge Schoch, that these documents that he was being asked to produce were not privileged documents. They were corporate records. I gleaned from the comments of the Court at that hearing that they may be corporate records, they may be business records of a corporation, but if you're (62) forcing him to produce them, you're running a risk that there is going to be a determination at some later time that these particular records can't be used against him. Now, we set forth in our position letter to the Court that Kastigar said we have to tell you what we are going to use, and in the letter we tell you what we are going to use. Items not set forth in the letter, as being what was in our possession prior to the contact with Mr. Portash, and items which are now a matter of public record, of the Board of Chosen Freeholders of Manchester Township Council or Manchester Municipal Utilities Authority, and items which were in our possession prior to any contact with Mr. Portash, may be used.

The Court: Well, I note in the bottom paragraph of Page 3, the paragraph which commences: April 17th, on April 17th and 24th, 1975; the testimony of Constance Kulpinski taken November 20, 1974, which would postdate the appearance of Mr. Portash before the Grand Jury when Judge Schoch had the hearing, exhibits pertaining to the above testimony, and matters of public record, such as minutes of—et cetera. When the letter says, "Exhibits pertaining to the above testimony," are there any exhibits there—

Mr. Brown: Not—

(63) The Court: —that would have been produced by Mr. Portash utilized later for the questioning of a witness?

Mr. Brown: No, Judge. Maybe I missed Mr. Dowd's

argument in his moving papers. We have made it perfectly clear, I think, to Mr. Dowd that we understand we can use no testimony from Mr. Portash on the State's case, and we can use no documents we obtained from Mr. Portash on the State's case. I came here today thinking that the problem might arise, and quite frankly, it would be a meticulous problem to handle, what we can use on cross examination of Mr. Portash. But as far as what we are going to put in on the State's case, we never had any intention of using either the testimony or any documents received from Mr. Portash, and we can document that the information from Constance Kulpinski was in existence a year before.

The Court: Well, what's your point, Mr. Dowd?

Mr. Dowd: The point? I think the indictment should be dismissed, number one— But we are beyond that.

The Court: I will make a ruling on that right now. I'm bound by the holding in Vinegra, which pronounces the law as pronounced by the Supreme Court in (64) the Blue case, which was decided in 1966. The Vinegra case specifically overruled *State* v. *Sarcone, State* v. *Roscania,* and *State* v. *Sibilia,* all of which held that the introduction of tainted evidence would warrant the dismissal of an indictment. Vinegra says no. Vinegra says it is merely a suppression remedy, that the evidence itself may not be used against the person against whom it was obtained in violation of his constitutional rights. I will take the State's recommendation that they don't intend to use any of that evidence in their case in chief. And as a consequence, how—and this is rhetorical—can the Court, within the framework of the holding of Vinegra, grant your motion to dismiss the indictment, Mr. Dowd?

Mr. Dowd: Your Honor, in the alternative, I would say Your Honor's bound by Vinegra.

The Court: I am bound by it. I have taken an oath.

Mr. Dowd: In the alternative, Your Honor, could you rule on our motion for a continuance of the case in view of the fact that on December 4th, which is not two weeks ago, the Supreme Court of New Jersey has decided that they will review Vinegra? And I think—to be risky and prophetic—a decision might be forthcoming in four to seven months, where the decision might (65) alter the course of what actions lawyers should take in trial courts. And I think it would be in the interest of justice, Judge, to see why they took the case up, what they have to say about it, see the applications, after much work, expense, time and effort, on everyone and all persons, are consumed. And I wonder, in view of that and in view of Your Honor's finding that you are controlled by Vinegra, whether the Court would consider carrying this matter until the Supreme Court rules on it, because it is, I think, the jugular vein of some of the major issues herein.

The Court: What's the State's position?

Mr. Brown: We would be opposed to a continuance.

Mr. Dowd: Assume the Supreme Court, Judge—excuse me, Mr. Brown—says: We reverse Vinegra, the remedy of dismissal? I don't know, none of us know, Judge, but we would be through with the trial.

The Court: Wouldn't your proper remedy be to apply to the Appellate Division for a stay? The trial court is bound by the law as it stands today; and the trial court, being the lowest of the low in the judicial hierarchy, has no right to postpone a trial of a case depending upon the outcome of the holding by a court of last resort. I would have to deny that stay, (66) but I most certainly would give you the right to go before the Appellate Division and ask for a stay. Trial courts are victims of calendars, Mr. Dowd. Appellate courts are not. But I have to recognize the law as it is, as it is as of now. I could not anticipate what a Supreme Court might do in Vinegra. The Appellate Division's decision is binding upon me at this particular point. And, as often happens, suppose the Supreme Court didn't act on it for a year, and turned around and affirmed Vinegra?

Mr. Dowd: I realize it is a complicated time of the history of this case, and the granting of a cert.—

The Court: Well, on the basis of the argument as advanced, I find that, under Point 3, the motion that the indictment should be dismissed must be denied by virtue of the present status of the law as pronounced by Vinegra.

Counsel is asking alternatively that a hearing should be held to determine what evidence is to be excluded at trial. Counsel has represented that nothing that was utilized by Mr. Portash in his testimony before the Grand Jury, either by way of oral testimony or exhibits, will in fact be introduced into evidence. That would apparently militate against the conduct of a (67) hearing. I would have to take counsel's representation that what he says he is going to do, he is going to do, which leaves—

Mr. Dowd: Your Honor, you denied the contractual argument, I assume?

The Court: Yes, sir. Yes, sir. The Court distinguishes the Santobello case completely from the situation here. The Santobello case involved a plea bargaining agreement after indictment between the prosecution and the defendant. When it came time for sentencing, the sentencing judge, who was not the judge who had participated in the plea bargaining arrangement, sentenced the defendant to a term of imprisonment which exceeded that which had been bargained for between the State and the defendant. The United States Supreme Court said that the trial

judge had no right to impose a sentence in excess of that which had been bargained for, that his alternative would be to impose the same sentence in order to enforce the plea bargaining arrangement, or to vacate the plea of guilty which was conditioned upon the plea bargaining arrangement and have the matter remanded for the purpose of trial. The Court cannot analogize this to plea bargaining, because in the first place, no indictment was ever in existence at the time these conversations took place. The Court (68) finds that the Prosecutor, although the Prosecutor—or the State, rather—although it may have represented that no indictment would be returned, that's a matter beyond the control of the State. The Grand Jury is an autonomous constitutional body that cannot be bound by any agreement between the State and the defense counsel. A Grand Jury, having the independent authority that it does have, most certainly could return an indictment. Then what the State might do after that point, is to move to dismiss the indictment, but that in no way is ever going to affect the validity or the authority, rather, of the Grand Jury, this independent autonomous body, to return an indictment in the first instance. The Court finds that the contract theory here is not analogous. There was no plea bargaining as such in this case. I am quite sure that counsel will agree with the Court's holding in that regard.

Mr. Brown: I would just make an inquiry. The Court is not making a factual determination on whether or not there was a promise, are you, Judge?

The Court: No. You don't need it.

Mr. Brown: Okay, Because I would—

The Court: In fact, I think there is a case right in point on that. The promise has fallen short of a plea bargaining. I will check it later.

(69) Suppose we take a five minute recess, gentlemen. I want to check that.

(A short recess was taken, after which the following occurred:)

The Court: Mr. Brown has raised the question as to whether or not the Court is going to make its determination with respect to the theory of the contract principle advanced by Mr. Dowd. The Court finds that there is no such thing here as an enforceable contract on the part of either party. This is not a situation where a plea has been entered. The contract—the Court knows of no theory of contract under the criminal law which can be enforced by the dismissal of an indictment. The Court has consulted the Standards Relating to the Administration of Criminal Justice, promulgated by the American Bar Association project on Standards for criminal justice. The only proceeding contained in that entire volume with respect to the contractual negotiations or arrangements between the State and Defendant is covered under Standards Relating to Receiving and Acting Upon the Plea, Part 3, Subparagraph 1, Propriety of Plea Discussions and Plea Agreements. The Court finds nothing in the Standards that would warrant the application of any type of contractual theory in the absence of a plea to (70) indictment; and so, accordingly, the Court finds that the contractual theory advanced by counsel was utilized in a plea bargaining case, namely the Santobello case. The Court knows of no other theory of law upon which an agreement by and between counsel can result in either the dismissal of an indictment or exclusion of evidence. The exclusion of evidence would not arise by reason of contract. The exclusion of evidence would arise by reason of the applicability of principles of law. You may comment on that for the record, Mr. Dowd, if you wish.

Mr. Dowd: Your Honor, assuming the Court does not accept the Santobello doctrine as applicable to this case, I think that Your Honor is aware that the cloak of your office gives you supervisory equitable control power over the administration of criminal justice. That is why we have decisions like Miranda and so forth. The prophylactic effect that the Court has is the power to interject into the method and means in which things come before the court. And I think D-1 is before the Court, which is a document of March 27, 1975, which is a specific offer—and I am using an "offer" in your Honor's decisional way.

The Court: Yes, sir.

Mr. Dowd: And if your Honor feels that this (71) is not a contract type matter, then in your supervisory inherent capacity in your office as a member of the judiciary, the inducement or seducement of Mr. Portash commencing back in the Exhibit 3—Exhibit 4, rather, Your Honor, and the following testimony of the following week, which is D-2, statement given the day Leisure Technology was indicted, and the other indictment, D-3, on the 5th of February, 1975, the acknowledgement by both Deputy Attorney Generals that they interviewed Mr. Portash as a witness potentially, coupled with the belated economic titillation by the State in D-1, resign a job and pay $23,322 (sic), or resign both jobs and pay $15,000, you are not indicated, it is the capacity—I am concluding, Judge—in your supervisory control over the fair, proper administration of criminal justice in the State of New Jersey, that it should be dismissed for those reasons.

The Court: Let me ask a question on that, Mr. Dowd. Are you seeking—and I am quite sure you are not—you ask the Court, in its inherent equitable powers, specifically, to enforce a contract between your client and the State?

Mr. Dowd: The effect would be the same, whether you excluded the indictment for reasons of enforcement, or if the State had no right to make such a (72) contract, or under your fact finding, Judge, to make such an offer, accepting even that then it was an improper inducement for my client to take a position which he did not have to.

The Court: But aren't you saying in effect that, by virtue of the discussions between the parties, a contract was arrived at in return for which the State would do A, and Mr. Portash would do B?

Mr. Dowd: That's correct.

The Court: Now, either you are stating that, by reason of the fact that the State added additional terms to that contract, that vitiated the contract and the contract is thereafter broken; or the other alternative, then, of course, you are dealing with the legal principle of a breach, or the State's additional terms was surplusage, they had no right to attempt to modify a contract accompanied by consideration. You are asking the Court to specifically enforce—excuse the split infinitive—to specifically enforce a contract between the State and the Defendant. Can you have it both ways, Mr. Dowd?

Mr. Dowd: What I am saying in the alternative, Judge, that—using any of the words which are all generic—breach, recision, reformation, expansion of a contract or a breach of a contract, assuming for the (73) sake of argument on the part of the State, leaves them whole and leaves us at a disadvantage; and when it leaves us at a disadvantage, my client is deprived of certain civil liberties that he need not have given up.

The Court: Isn't the only contract recognized in law, between the State and the Defendant, one which involves plea bargaining?

Mr. Dowd: Factually, under Santobello. That is the only case I know of, factually. But I don't think the doctrine would be limited to plea bargaining.

The Court: Well, you mentioned application of equitable principles. Of course, in construing contracts, equity always follows the law. You can't have it both ways. You can't sue for breach of contract, and you can't seek specifically to enforce a contract. They, of course, are inconsistent remedies. When you sue for breach, you deem the contract as gone. And I gather from your previous statement that, the minute the State stated that they wanted the Defendant to resign from the Pinelands Environmental Council, that a new term was added to the contract; ergo, a breach.

Mr. Dowd: A second term, yes sir.

The Court: Doesn't that vitiate the contract?

Mr. Dowd: But it doesn't extricate the accused from the position they had placed him in by the (74) initial contractual deal.

The Court: Aside from any evidential problems, is he any worse off now than he was before the discussions were entered into?

Mr. Dowd: He's indicted. If Your Honor is asking me, I can answer that after Your Honor rules on the Bill of Particulars and the use and the exclusionary rules Your Honor will have as to evidence in this trial, if Your Honor understands how I made that—

The Court: Yes, perfectly.

Well, the Court cannot see the application of any contractual principles here, because the Court finds that the sole case cited by counsel dealt with the tender of a plea, the acceptance of a plea and the breach thereafter by the State. That's the Santobello case. That's our Spinks case, which is in 66 N.J. And we have a new case, the citation

of which I don't have, where the State has the Defendant agree that he would not take an appeal. The Supreme Court decided that in the last two or three weeks—I am quite sure counsel is familiar with it—where the Supreme Court said, no, that's an unenforceable arrangement. I know of no other contracts between a State and Defendant, other than those concerning pleas, that the courts will take cognizance of for the purpose of determining a breach or (75) determining the enforceability.

Mr. Dowd: Your Honor, I respectfully disagree.

The Court: Can you show me one case, Mr. Dowd?

Mr. Dowd: If Your Honor's conclusion is that I can't have it both ways, I think in New Jersey we can plead in the alternative and, consistently, if one argument fails, the other doesn't. I may be in error there, but procedurally, I think I may.

The Court: But what you are saying, Mr. Dowd—And I am not talking about procedurally, alternatively or hypothetically or consistently or anything like that—either you contend that a contract is in existence—

Mr. Dowd: That we would contend.

The Court: —or you contend that a contract has been breached. Now, the minute a contract is breached, there is no contract. Then you are entitled to damages for the breach. Equity, regarding that is done which ought to be done, cannot conceive of the concept of a breached contract. There is no such thing in equity as a breached contract. Equity says: Perform, complete the contract. When you mention equitable principles, you are asking me to compell the State to perform a contract to which another term has been added, and which has been rejected by the Defendant.

(76) Mr. Dowd: I don't think you have the power to do that.

The Court: Of course not.

Mr. Dowd: I do say, Your Honor, where there is a breach—and I am using that word in an academic sense—that under the prophylactic effect of pronouncements like the Miranda doctrine, the doctrine, and other State doctrines where the Courts can keep some supervisory exclusionary control over the administration of criminal justice, where the Defendant is left in a lesser position than he was before the breach—and you have found something. I am not sure you found no contract or no enforceable contract—I'm not certain what Your Honor meant by that—or no authority to make a contract binding on a Grand Jury; that if these representations were made in good faith, they did not have the inherent power to make them to the detriment of the accused, and I think they should be prevented and estopped from going forward.

The Court: Then in the Santobello case, if you were to follow your argument, there should have been a motion to dismiss the indictment.

Mr. Dowd: I think so.

The Court: Vinegra says, where a man's Fifth Amendment rights are violated, there is no such thing as (77) a dismissal of an indictment. You are right back to suppression.

Mr. Dowd: Right. I realize, Your Honor, this may sound—and I'm not saying this apologetically—this may sound all not in tune with the law, but since the Supreme Court is taking Vinegra up, the record has to be preserved if it is turned over.

The Court: Of course.

Mr. Brown: Judge, I just would like to comment. I think part of Mr. Dowd's argument must fail, when he alleged that there was an agreement. Because if there was an agreement, there would have been no reason for the

State not to perform, or Mr. Portash not to perform. I think the problem arose because the agreement was never realized, and when it got to the point of formalizing an agreement, writing up alternatives to be either accepted or rejected, they were rejected. So there was never anything more than an offer. There was never an acceptance of an offer. What there was, there was not plea bargaining, but there was, at a pre-indictment stage, an attempt to make an offer that, in return for cooperation in this or other matters—

The Court: Call it a charge bargaining, as opposed to plea bargaining.

(78) Mr. Brown: —charge bargaining, but we never had an agreement; and if we never had an agreement, there is no necessity for—there can't be a performance.

The Court: It is an interesting theory of law, but I know of no case law that would support it. I know that Santobello and our own Spinks case did not warrant the dismissal of an indictment, using the Blue language, that drastic remedy. "Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."

Now, that's the United States Supreme Court, and when they had the Santobello case, all they had to say, applying the constitutional principles: We dismissed the indictment and we barred the further prosecution of this man. And they didn't do it. They sent it back, and what they said is: Vacate the plea or conform to the plea bargain.

Mr. Brown: One further point, Your Honor. When counsel states that this is done to the detriment of his client, I ask the Court to keep in mind that we (79) have represented—I don't think counsel contests it—that all of the evidence that was presented to the Grand Jury that indicted him was in existence prior to the contact with this Defendant, with the exception of Constance Kulpinski, which I think counsel will agree was one of the original causes for this investigation being started over a year before. So it's—I don't understand what injury counsel claims as a result of what he feels is the lack of performance of an agreement, because it was already documented at some time prior to contact with the Defendant.

The Court: When you are using the term "injury", I presume you are using the legal term, "detriment".

Mr. Brown: Yes. What injury is it, or detriment, to his defense?

The Court: Well, the Court finds the existence of no contractual arrangement here, a breach or violation of which, assuming that one would be found, would warrant the drastic remedy proposed by counsel, that the indictment be dismissed. If the Court's decision on that was unclear before, I just want to repronounce it; and the Court doesn't feel that Vinegra will have any effect on the Court's ruling here, because this does not involve a Vinegra situation here, this (80) alternative argument, namely, any "contract" which may have been developed subsequent to the witness' first appearing before the Grand Jury in November of 1974.

Mr. Dowd: Your Honor, I believe we have basically the main one left, the Bill of Particulars, which gives me great concern.

Mr. Brown: They were in separate moving papers.

The Court: Yes. I have them in the file here.

Okay. Let the record indicate that on June 3, 1975, what is entitled a Bill of Particulars was served upon the Attorney General, and the copy filed in the Superior Court jacket. The Court notes that the caption is possibly misleading, in that although it is called Notice of Motion and Demand for Bill of Particulars, counsel refers in the beginning to Rule 3:7-5. It would appear to the Court that much of the information desired here would fall in the category of Rule 3:12-2 et seq., which I believe counsel has made reference to during the course of the questions. The Court wants to point that out because there is an academic difference. The right to a Bill of Particulars is a right of constitutional dimension. It stems from the Sixth Amendment right to have the Defendant informed (81) of the nature of the charges against him. Rule 3:13-2 is a rule promulgated as a matter of grace by the Supreme Court, not a matter of constitutional rights, where the Supreme Court in its wisdom has found that disclosure of the adversary's case will tend to make trials more nearly a search for the truth. The Court finds no constitutional values involved in the enforcement of Rule 3:13-2. The Court has a feeling that if the Supreme Court wanted to repeal that rule at the next session, why, they most certainly could; and I am quite sure the Bill of Particulars would still be in existence. Now, Mr. Dowd, I invite you to say what you desire, sir.

Mr. Dowd: Thank you, Judge. Your Honor, we are in two areas. I will leave the exclusionary situation for a moment. Your Honor, I would like the Court to order the prosecution, as to Count One, to specifically spell out that portion of the indictment. I am going to the third line from the bottom of Page 1, Your Honor—the fourth, starting with: "Did willfully, knowingly and corruptly

engage in misconduct in his said public offices, that is, the said Joseph S. Portash did breach and violate his aforesaid duties by using the power and influence of is said public offices to obtain for Leisure Technology Corporation and its (82) affiliated and subsidiary corporations favorable treatment," et cetera. And it goes on, Judge. Judge, I cannot prepare before trial without knowing what this means. When did he corruptly do it,—I am leaving the adjectives out, Judge. They are all statutary words.

The Court: Yes, sir.

Mr. Dowd: —the misconduct in public office? What duties did he breach, insofar as what applications, from "Leisure Technology Corporation and its affiliated and subsidiary corporations favorable treatment for and favorable disposition of divers applications and proposals then pending and to be presented by the said Leisure Technology Corporation to the public agencies of which the said Joseph S. Portash was a member—."

Your Honor, Mr. Portash, during the period of time when the indictment was returned, was a Freeholder for the County of Ocean, Mayor of the Township of Manchester, and for a time, a member of the Manchester Public Utilities Commission. He was a pro forma member of the Planning Board of Manchester. Your Honor, I don't know who the subsidiaries or affiliates are with Leisure Technology. That's number one. I don't know who they are referring to. Number two, I don't know what "divers applications" encompasses. They refer to "public agencies of which Mr. Portash was a member". (83) What are agencies?

The Court: Are you asking what are agencies, or what—

Mr. Dowd: What do they mean?

The Court: —or what agencies are referred to in the indictment?

Mr. Dowd: That's right, Your Honor. What applications were referred to? I have been advised, Your Honor —I can't represent this factually—but I have been advised that there may be thousands of divers applications and proposals. Now, we may eliminate certain things that are not considered by the prosecution to be applications and proposals, but I would like to know where, when and by whom, Mr. Portash acted on certain things, or anticipatedly would act on certain things.

The Court: Mr. Brown.

Mr. Brown: Judge, as I think we started to discuss this morning, when Mr. Luciani was present, we are speaking of applications of Leisure Technology Corporation and its subsidiaries, such as Leisure Village, Leisure Knoll, subsidiaries wholly owned by Leisure Technology Corporation, who had applications pending before the Board of Chosen Freeholders of the County of Ocean, the County of—the Township of (84) Manchester, and the Manchester Public Utilities Commission. And those applications, which in Mr. Luciani's letter he refers to, are matters of public record, and the matters of public record of the actions of the Board of Chosen Freeholders, of the Council of Manchester, and the minutes of the minutes of the Manchester Public—the Manchester Municipal Utilities Authority, where Mr. Portash voted favorably during the period of time that he was on the payroll of the Madison Agency, a subsidiary of—at least partial subsidiary—of Leisure Technology, Inc.

The Court: Are you contending that every application made to any one of the agencies in which Mr. Portash ostensibly had a voice, and which emanated from either Leisure Technology or any of its subsidiaries, constituted one of the acts referred to in the first count?

Mr. Brown: Yes, sir.

The Court: Now, what would be the probability of double jeopardy here?

Mr. Brown: I think, Judge—

The Court: Suppose you prove that, and Mr. Portash is tried, and the case is disposed of, and then a week later, an indictment couched in identical terms culls fifteen more and then twenty-five more and then (85) fourteen more? Now, you have embraced a time period here between the first day of July 1971, and on or about the 12th day of December, 1972.

Mr. Brown: I think that Mr. Portash would be protected on the disposition of Count One of the indictment against any subsequent charge of misconduct arising out of his voting in favor of applications of Leisure Technology, Inc. and its subsidiaries to the Board of Freeholders, to Manchester Township, and to the Manchester Municipal Utilities Authority.

The Court: All right, now. Assume that one of the things you intend to prove is an occurrence, we'll say, that took place on May 31, 1972. Mr. Portash at that time was out of the country.

Mr. Brown: I think first, Judge, that we would be bound by the time period of the indictment. I think also—

The Court: All right. Now suppose he says: I was out of the country or out of the state fifteen times, or I missed twenty-four meetings during this period of time. I want to know at which meetings you contend these incidents took place.

Mr. Brown: I would say the meetings—The testimony we are going to offer, through the Clerk of the Board of Chosen Freeholders, the Clerk of the (86) Township of Manchester, and the Clerk of the Municipal Utilities

Authority, will be meetings where Mr. Portash was present, or spoke on a particular application, or voted on a particular application.

The Court: Mr. Dowd says: Tell me about them.

Mr. Brown: I'll make those minutes available to him, Judge. What he is looking for, he is looking for me to take discovery and catalog discovery for him. That's what he is looking for.

Mr. Dowd: That's exactly—

Mr. Brown: I don't think the Bill of Particulars can be used—

The Court: I am treating this as a hybrid combination, as I say, of a Bill of Particulars and request for discovery.

Mr. Brown: I also think we should approach it—Judge, there's been no—

The Court: I will say this, counsel: You should have broken it down.

Mr. Dowd: I will—

The Court: You should not have combined proceedings under Rule 3:13 with proceedings under 3:7-5, because the Court is required at that point to apply different principles of law. One goes to the constitutional requirements, the other goes to the crux (87) of the discovery rules.

Mr. Dowd: I think in this particular case, Judge, by way of response to that, the applications—the physical applications, Your Honor, and I assume this is what we are talking about—and the alleged acts on the applications, are Siamese twins. They are indistinguishable in this particular set of circumstances. Your Honor, there is a practical suggestion here, that flows through my mind, to resolve this. There will be a trial, I assume. Mr. Brown or Mr. Luciani as the trial counsel will present, I assume, to the Jury, through a competent witness, certain appli-

signed or what. I really don't know why that is there but I know that Mrs. Herring was unavailable last night for trial for the purpose of bringing the records in because of her flu and the possible complications.

Mr. Brown: I would object to it for that reason.

The Court: Well, Counsel has withdrawn it.

Mr. Brown: Fine, we don't have any problem.

The Court: Anything further, gentlemen?

Mr. Wilbert: Yes, your Honor. Your Honor, my client wishes to take the stand, however, I am in a position that I can't advise him to take the stand because I believe that the Court's ruling will require an extreme burden not only on the Court but (82) also, I believe that it requires an extreme burden on his Sixth Amendment right to take the stand, that he is going to have this evidence utilized against him improperly not only over the representations of the Deputy Attorney General that they would not be, not only over the representation of the Statute and the plain meaning of the Statute that they would not be but over the Court's own ruling earlier that I believe that the Court in clarification has really, in effect, prevented my client from exercising his right to the Sixth Amendment and so I will not counsel my client to take the stand, in fact, I have counseled him not to take the stand because of the Court's ruling.

The Court: All right. The Court wants to clarify one thing. The Court's ruling in no way has prevented your client from taking the stand. What the Court has done when confronted with an evidence problem has examined all the applicable case law that it could find, all the statutes, all the rules of evidence and the Court has made a pronouncement which the Court considers in its judicial wisdom to be (83) compatible with every holding by a court

of last resort in this state. The Court's oath requires that it be bound by the controlling law of the State of New Jersey so if a peripheral consequence of the Court's ruling is that an application be made by you in your tactical defense not to have your client take the stand, I can't see how in any way that can be construed as constituting a ruling by this Court preventing your client from taking the stand. That was the language you used, Mr. Wilbert. Of course, the Court finds it to be at variance with the Court's application of what the Court considers to be the authoritarian law with respect to the peculiar factual situation disclosed here. So if the record represents that the Court has prevented your client from taking the stand, the Court most certainly on the record wants to disabuse that notion upon the record.

Mr. Wilbert: The only issue I would take with that, your Honor, is that I believe the Court made no mention, of course, of the case and the only case that is exactly on (84) point in this instance and that is the *Hockenberry* case, a case from the highest court in the land. I believe while federal rules are persuasive and not binding, federal rules become more persuasive when there is a lack of other cases in the jurisdiction in the State of New Jersey. In New Jersey I would argue not only is there not a case exactly on point, I would argue on the contrary. There is case law which indicates the rule to be applied is the *Hockenberry* rule which is found in *Vinegra*, citing *Kenny* as the controlling case with regard to the use of immunity and—

The Court: Well, Mr. Wilbert, you're arguing the Court's construction of the law.

Mr. Wilbert: I am, I most respectfully submit that I am. I don't mean to lightly argue that but I feel in my

client's interest I am compelled to argue against the Court's ruling and I have.

The Court: Anything further?

Mr. Brown: Just this, Judge, on the point of clarification what I attempted to bring out to the Court under *State* v. *Boncelet* (85) is the scope of my cross examination. I think the discussion of last Thursday resulted in certain conditions being set by the Court. I think the discussion of today was an attempt, a suggestion by Mr. Wilbert that if he limit his client's direct examination, then I should be precluded from cross examining his client on everything that has been presented to this jury in the case in chief which I would strongly object to do, to the Court instructing me to do so.

The Court: Well, not to interrupt, the Court has made no such pronouncement. I believe the Court has pronounced what it considers to be the law regarding scope and extent of cross examination of a party defendant. You may continue.

Mr. Brown: I have nothing further.

The Court: All right. The Court is concerned with Mr. Wilbert's pronouncement that I have prevented his client from doing anything, nothing could be further from the truth, Mr. Wilbert.

Mr. Wilbert: Your Honor, I don't mean that you intentionally, I don't mean that you (86) in an adversary way did any such thing, I certainly would not even suggest that to the Court. But I believe that the effect of the Court's ruling, whether it was done—and I submit it was done because of your reading of the applicable case law and I don't in any way argue why you made your ruling; I argue, your Honor, that the effect of it is to prevent my client from taking the stand because I cannot

foresee how the Court has, your Honor has, in your own terms indicated what an impossible burden it is to seek question after question clarification that would of necessity prolong this trial possibly two, possibly three weeks because of the nature of the extensive grand jury testimony and because as we now have the representation of Counsel that he wishes to cross examine and I only must argue that he has to imply thereby that he's going to be permitted or going to seek permission to enter into the areas of grand jury testimony. It's immunized and I would strongly argue that that is an impossible burden and, of course, the burden is my Sixth Amendment rights, (87) my client's Sixth Amendment rights which are also impossible to evaluate. I sincerely believe that I will stay free of any cross examination questions with regard to that grand jury testimony and then to subject him to a question by question Court determination of what is inconsistent, what is consistent and what areas may be invaded as to his grand jury testimony, as to the cross examination so I can't make—

The Court: Well, Mr. Wilbert, on the basis of the Court's ruling, you are making a tactical election.

Mr. Wilbert: I don't believe it's that. I don't believe it's a merely tactical election, I think it's foreseeing that my client's rights as given to him by the Statute and as given to him by Mr. Luciani's own words will not and cannot in the Court's opinion be given effect and, therefore, he cannot exercise his Sixth Amendment rights to take the stand.

Mr. Brown: Judge, I hesitated to respond before because I thought the Court made it very clear. The position of the State is (88) that Mr. Wilbert consulting with

his client, Mr. Portash, may elect to testify, may elect not to testify, that is a privilege of Constitutional proportions which only Mr. Portash in consulting with his attorney can arrive at because of the factual history of this case. Mr. Wilbert has brought to the attention of the Court certain areas that he felt should not be allowed in this trial on cross examination. I'm not going to go into them because I think the record is complete on the arguments advanced by Mr. Luciani and by Mr. Wilbert as to what the State should be allowed to use on cross examination. The Court, out of the consideration of Counsel, both prosecution and defense, has expended probably four or five hours in chambers listening to argument and making not an advanced determination but indicating to the prosecution and the defense what the Court understands the existing law to be. I'm prepared to proceed under that existing law. The fact that this examination of a defendant might take a week, two weeks or three weeks is of no moment at this time when we are deciding (89) the defendant's Constitutional right to testify or not to testify. The State is ready, willing and able. In fact, it was my suggestion if the Court recalls that when I got to that point in cross examination where I was going to cross examine the defendant on what I felt was an inconsistent statement before making reference to the inconsistent statement I would approach side bar and so advise the Court so the Court could make a determination. So I don't think that this record should in any way indicate that the Court has precluded this defendant from testifying or that the State has precluded this defendant from testifying. The Court has given us the benefit of your review, your wisdom, your determination based on extensive arguments by prosecution and defense. We

stand ready, willing and able to proceed and we will proceed whichever way the Court directs us and for as long as it takes but there is absolutely nothing in the Court's suggestion to both counsel of what the Court feels is an interpretation of the existing law which prohibits (90) Mr. Portash in any way from taking the stand.

Mr. Wilbert: Your Honor, I feel compelled to respond to that if I'm permitted and just to the extent that, and I will ask a rhetorical question, of course, and I don't expect Mr. Brown to answer or he may. What, indeed, was the entire purpose of conducting an investigation, having certain evidence that the Prosecutor must now feel at least is worthy of a prima facie case in which the Court has placed its imprimatur on because of the motions at the end of the State's case, then bringing a man before a court of law, granting him immunity and advising him defacto, also, that they would not use that testimony in any way against him and they now sit here at the crucial moment in the case when Mr. Portash wishes to take the stand and advise to the Court that they are intending to use any inconsistencies in the grand jury testimony to examine him in cross examination in this case?

The Court: Well, you're going right back to the legal arguments previously advanced upon which the Court made the ruling (91) and the Court wants to point out that the Court's suggested to Counsel that before the question be posed, if it be considered to be improperly inconsistent, if the Court would make a ruling at side bar to foreclose anyone from being put in the anomalous position but, Mr. Wilbert, your argument is directed to the postulate that the Court, by its ruling, is preventing your client from testifying. Now, Mr. Wilbert, once again, nothing could be further from the truth.

Excerpts from Transcript of Proceedings of February 9, 1976

Mr. Wilbert: Then if you, as a matter of housekeeping, will entertain question by question and as Mr. Brown just stated, whether this takes three weeks is of no moment in the comparing Constitutional rights, I would request that the Court conduct this prior to direct testimony so that we may have a ruling.

The Court: No, Mr. Wilbert. What you're asking the Court for is plenary, evidential rulings in advance which the Court, even if it were inclined to do, is not permitted. There is no such thing as a dry run in a criminal case. My suggestion that they be disclosed at side bar is a suggestion, nothing (92) more, because I have no power to foreclose in advance Counsel who is in charge of his case to pose a question which he feels is relevant and competent, the remedy as we know is the objection and the ruling thereon.

Mr. Wilbert: I submit you do, your Honor, only on the basis of a Rule 8 hearing and that a Rule 8 hearing as to admissibility of evidence is certainly cognizable by this Court and is engaged in many instances—

The Court: Mr. Wilbert, you're not asking for a Rule 8 hearing, you're asking for the Court to rule upon the propriety upon every question which Counsel may choose to ask.

Mr. Wilbert: Which your Honor will ultimately do. If we do it at side bar—

The Court: Mr. Wilbert, isn't that the same situation whenever witnesses take the stand?

Mr. Wilbert: No, your Honor, there are questions I believe that come up during testimony that may call for an objection and a ruling but not asking about the admissibility of evidence as we are here. This entire (93) testimony is based upon admissibility—

Excerpts from Transcript of Proceedings of February 9, 1976

The Court: We're flogging a dead horse here. You represented to me you intended to ask no inconsistent questions.

Mr. Wilbert: That's right.

The Court: Then I will be called upon to determine whether or not a question, if posed, would elicit an answer inconsistent with the witness' grand jury testimony provided it is otherwise relevant and that's what I thought was clarified but to convert that into a ruling by the Court that will prevent your client from testifying is beyond my judicial comprehension, I can't understand that.

Mr. Wilbert: Your Honor, possibly I have misunderstood the Court's ruling but as your Honor just said, how can I protect my client from the use of grand jury testimony if your Honor is going to rule whether the cross examination question that is posed by Mr. Brown, whether it may call for an inconsistent answer than that given in the grand jury, that affords me absolutely no protection whatsoever and the immunization and the testimony derived (94) therefrom is a nullity.

The Court: I thought you agreed upon that with Mr. Brown before lunch.

Mr. Wilbert: I didn't agree that he could ask those questions.

The Court: You most certainly represented to me that your area of direct examination would not disclose the existence of any inconsistencies.

Mr. Wilbert: Exactly and I said, your Honor, if I did enter an area that was inconsistent on direct, then perhaps under your Honor's ruling it could be used at all, it would be ripe as to cross examination as to an inconsistency. How can that lead to the proposition that Mr. Brown may open up inconsistencies by asking questions on cross examination?

Excerpts from Transcript of Proceedings of February 9, 1976

The Court: Mr. Wilbert, I've devoted more time to this case in chambers to enlighten Counsel with respect to evidence rulings and proposed actions that the Court might take to a greater extent than any case I have ever tried among the hundreds of which I have tried. I realize the seriousness of this case, the (95) delicacy of the proceeding and I have bent over backwards not only to have Counsel postulate a theory and have the Court make a ruling but I have given Counsel carte blanche in placing their position on the record so in the event of an adverse ruling to your client by this jury the Appellate Division is going to be completely enlightened as to the reasons for the Court's ruling. Now, under *Abbott* I'm only required to do one thing: Listen to the question, entertain the objection, if the objection is that the question can't be asked as *Abbott* says, Counsel has placed his position on the record, he is protected. If the question is objected to and Counsel wants to place an offer of proof on the record he may do so at side bar out of the hearing of the jury. Very early in the case I called to Counsel's attention the *Abbott* case and the implementing Court Rule but I've spent so much time in my chambers making these advisory rulings, which is what they are, that I feel that I am bending over backwards to enlighten Counsel when I should be out on the bench disposing of this (96) case. Because of the serious nature of it, because of your client's position in the community and the like I have given far more time to in chambers rulings than I have ever done in any case I have ever tried from first degree murder on down. Now, I have made my ruling, Mr. Wilbert. You may advise your client and if your client intends to go against your wishes, I will personally question your client to be sure that your client

Excerpts from Transcript of Proceedings of February 9, 1976

understands what may take place and I believe I have that right, Counsel.

Mr. Brown: I think you almost have a duty to put it on the record, the client's decision.

The Court: Yes, the client's decision, not the attorney's.

Mr. Brown: Yes, I would request that it be done.

Mr. Wilbert: Well, your Honor, I have advised him not to stand the stand. If he wishes to do so, if you will—if you care to speak to him about it, I have no objection.

The Court: No, it's usually in the reverse situation where the attorney advises the (97) client to take the stand and the client doesn't take the stand, then in the event of the appeal where the client says I wanted to take the stand but my lawyer didn't—wouldn't let me, that questioning there is to clarify it. I'll take your representation that the determination is your client's, Mr. Wilbert, and we'll proceed from there.

Mr. Wilbert: I believe it is at this point, he's here in the room and—

The Court: Well, I want the record to show that Mr. Portash has been present at most of the evidentiary rulings that the Court has made in chambers. You're representing to the Court now that a decision is going to be made by your client, you have advised him not to testify and the decision is his.

Mr. Wilbert: The decision is his.

The Court: All right, anything further?

Mr. Brown: No, sir.

(End of discussion in camera.)

(Whereupon a recess is taken.)

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In The

Supreme Court of the United States

October Term, 1977

No. 77-1489

STATE OF NEW JERSEY,

Petitioner,

vs.

JOSEPH S. PORTASH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1977

No.

STATE OF NEW JERSEY,

Petitioner,

vs.

JOSEPH S. PORTASH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Joseph Portash, respectfully prays that a petition for writ of certiorari sought by the State of New Jersey to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceedings on June 29, 1977 be denied.

OPINION BELOW

The opinions of the State courts are included in the appendix of the State's petition.

JURISDICTION

The respondent, Joseph Portash, contests the jurisdiction of this Court for the reasons set forth in this brief.

QUESTIONS PRESENTED

I. The method by which the respondent invoked the privilege against self incrimination was proper and was a matter of procedure of the courts of New Jersey and does not present a substantial federal question.

II. The decision rendered by the New Jersey Appellate Division was based upon the interpretation of the New Jersey statutes in relation to the New Jersey Constitution and as such does not present a controversy to come within the jurisdiction of the Supreme Court of the United States.

III. The State should not be permitted to impeach a defendant at subsequent criminal trial with defendant's prior immunized Grand Jury testimony compelled by the State on investigation of identical matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment.

> "No person shall be compelled in any criminal case to be a witness against himself as applied to the State of New Jersey through the Fourteenth Amendment."

New Jersey Public Employees Immunity Statute, N.J.S.A. 2A:81-17.2a2.

> "If any public employee testifies before any Court, grand jury or the State Commission of Investigation, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury committed while so testifying."

Statute was amended after respondent testified before the Grand Jury and in its present form states:

> "If any public employee, *having claimed the privilege against self-incrimination,* testifies before any court, grand jury or the State Commission of Investigation *after having been informed that his failure to appear and testify*

would subject him to removal from his office, position or employment, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury *or false swearing* committed while so testifying."

STATEMENT OF THE CASE

Joseph S. Portash, respondent herein, worked as an Assistant Ocean County Planner in 1960, whereafter, he was appointed and later elected as a member of the Manchester Township governing body in Ocean County. Prior to this time, the concept of a senior citizens development had begun in neighboring communities. In 1964, as Mayor of Manchester, he promoted the concept of Senior Citizen Family Developments. Similarly, he developed a unique real estate analysis method used in selecting a site for the Ocean County College. In 1969, he began informal work for the Madison Agency, a real estate and insurance agency in Lakewood, Ocean County, New Jersey. A few months after that relationship began, Joseph S. Portash was appointed to the Board of Freeholders, at which time he left his position as Ocean County Planner.

Eventually, in 1971, Joseph Portash became a formal employee of the Madison Agency and began receiving paychecks. At that time, he received a promise of $5,000 for past services and $10,000 advance on future services. Work for the

Madison Agency consisted of site analysis projects outside Manchester Township on development of real estate projects in Ocean County, and conferences with Donald Safran, the owner of the Madison Agency. During this period of time and while acting as Mayor of Manchester Township, a member of the Municipal Utilities Authority, and as Freeholder Director, Joseph S. Portash voted on several items involving Leisure Technology Corporation, which was engaged in business in Manchester Township. Many of these votes hindered projects already begun by Leisure Technology and imposed requirements upon Leisure Technology at considerable increased cost to the corporation; requirements which other municipalities had not even requested. (See testimony of Justin Segal.) Many of the foregoing facts were not brought out at trial and were not presented to the jury, as the trial court's ruling precluded the respondent from taking the witness stand in his own behalf.

In 1970, the Township of Manchester created a Municipal Utilities Authority, of which Joseph S. Portash, as Mayor of Manchester Township, was appointed a member.

Meanwhile, and for a considerable amount of time prior to 1970, the Madison Agency had been servicing Leisure Technology, providing it with various forms of insurance coverage. Indeed, the Madison Agency received checks periodically to cover the premiums on said insurance and numerous loans which Robert Schmertz made to Donald Safran (as indicated by testimony of Madison Agency bookkeeper, Catherine Prisco).

Prior to the creation of the Municipal Utilities Authority, Manchester Township had given franchises to other senior citizens developments including Crestwood Village, in the case of water and sewer, and Cedar Glen Lakes, in the case of water. In order to induce Leisure Technology to develop in Manchester Township, the municipal body in early 1970 unanimously agreed to award Leisure Technology a franchise for sewer and water (as indicated in testimony of Seymour Kagan, Attorney for Manchester Township Municipal Utilities Authority). On July 1, 1971, Joseph S. Portash was formally hired by the Madison Agency to do site analysis and render consultation services as a Professional Planner. Had Mr. Portash been able to testify, he would have indicated that he had no knowledge of any connection between Leisure Technology and the Madison Agency at the time of his employment and indeed, never learned of the fact that Schmertz was an equal but silent partner during his employment. Portash's pay during that time netted, after taxes, $241.20 per week, which was paid to him by check in the ordinary course of business of the Madison Agency. During this period of time, applications before the Ocean County Planning Board concerning Leisure Technology as well as other developers were considered. Several times Joseph Portash was absent during the voting on these matters, (as indicated by testimony of George Buckwald, County Planning Board Chairman). Indeed, in instances where a vote was taken involving matters in which the defendant knew he had a conflict, including matters brought to the Board by First State Bank, a bank in which Mr. Portash was a director, Mr. Portash would abstain. On September 23, 1971, the Madison Agency received a $15,000 check from Leisure Technology. Thereafter, $15,000 went from the Madison Agency to the Insurance Company of

North America, as stated in the testimony of the Madison Agency bookkeeper, Mrs. Prisco, who explained generally the accounts and the activity in those accounts of the Madison Agency (T5 entire volume). The tracing of the $15,000 check through the accounts is particularly stated at T5 170-3 to 172-4 wherein the witness testified that the check came from Leisure Technology to the Madison Agency on September 23, 1971 and on the next day a check in the amount of $15,000 was made payable from the same account (Account No. 103, a non payroll account of the First State Bank) to Insurance Company of North America, in payment for Leisure Technology insurance premiums. The Attorney General insisted that the payment was for Joseph Portash, notwithstanding the unrebutted proof to the contrary. Had respondent been permitted to testify at trial he could have resolved any question of guilt in his favor.

Prior to his trial on November 6, 1974, Joseph Portash appeared with counsel before a State Grand Jury investigating Robert Schmertz, Leisure Technology's President, and Madison Agency principal. Respondent's appearance before the Grand Jury was in response to a subpoena served upon him on October 29, 1974. He expressed his intention of claiming his Fifth Amendment privilege against self-incrimination. Subpoenaed again for November 14, 1974, Joseph Portash was granted immunity in the following terms;

> "We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a

> prosecution for contempt, false swearing or perjury. No representations have been made insofar as prosection for any offenses for which evidence has already been presented to a State Grand Jury, a separate Grand Jury from the one Mr. Portash is about to appear before."

Respondent was asked whether he understood the purport of this agreement.

> "Mr. Luciani: [Deputy Attorney at Grand Jury proceeding and co-counsel at subsequent trial] Mr. Portash, do you understand, have you discussed this matter with your attorney?
>
> Mr. Portash: I believe so.
>
> Mr. Luciani: And you understand the fact that nothing you are about to testify to can be used against you, personally, in any subsequent criminal prosecution?
>
> Mr. Portash: To the best of my knowledge of legal matters, yes."

Respondent than testified before the Grand Jury.

Thereafter, the State contacted the respondent and took another statement on February 5, 1975, based on information learned by the State as a result of respondent's immunized Grand Jury testimony. No agreement was ever reached with

regard to whether Mr. Portash would step down from office or make payment, as the State urges in its brief in support of the petition for certification. During this time the State had several meetings with the respondent directly, both in person wherein the Deputy Attorney General, G. Michael Brown, discussed Mr. Portash's potential testimony and advised him that he would have to alter or strengthen his testimony in order to successfully prosecute other defendants (T13 29-15 to 30-17). Also, Mr. Luciani initiated several telephone conversations with Mr. Portash, one of which was more than an hour's length in duration. The State urges in its brief that he reluctantly agreed to this "extraordinary" circumstance. It declines to mention that the initiation for these extraordinary circumstances was by the Deputy Attorney General involved.

The State attempts to paint the respondent as the pursuer of the Attorney General in its petition. That is neither truthful nor sensible. The State was initiating the investigation, was pursuing witnesses, among whom was Mr. Portash, and contacts were initiated by them. They were not the reluctant, unwilling pawns, as they would have themselves characterized by their statement of facts. They were, to the contrary, aggressive seekers of Mr. Portash's cooperation. Long colloquies in the petitioner's statement of facts are inserted, apparently, for the purpose of justifying the State's attempt to remove respondent from his official positions and extract from him amounts of monies, which would be paid to the State. This campaign was carried on actively by the State but the respondent never made a commitment to make payments or to resign from any public office. The State further contends that they obtained information in preliminary negotiations which deemed it

advisable on their part to seek the resignation of Mr. Portash from the Pineland's Environmental Council. No testimony was ever given which could logically be construed to suggest his removal from that body, and this is a blatant attempt to character assassinate by innuendo the respondent without any justification in fact.

The State contends that the statement given by the respondent subsequent to his immunization before the Grand Jury on February 5, 1975 was a non-immunized statement (Petition, 6). It is clear that these statements were derived directly from the immunized testimony and therefore were also immunized. The speciousness of the petitioner's argument is fashioned at this level out of a desperateness to excoriate the respondent without regard to the legality or propriety of the method used. Respondent indicated in the Grand Jury testimony that he had "reconstructed" certain records from his employment with the Madison Agency. Such reconstruction is characterized by the petitioner in his brief to be "fabrication." The petitioner's statement of facts amounts to a rambling diatribe against respondent, which has little or no support in the record of the case.

Joseph Portash was indicted by a State Grand Jury, with misconduct in office and extortion by a public official.

The case was in trial for 16 days during which time numerous witnesses testified for the State and the defense. The jury thereafter deliberated approximately 17 hours over two days and for 12 consecutive hours on February 11, 1976, the date on which the jury reached its verdict. The jury found the

respondent not guilty of misconduct in office, but guilty of wrongful taking.

The court, by allowing the State to use the respondent's prior immunized testimony for impeachment purposes if he testified in his own defense, placed the respondent in a position where he was not able to take the stand. Therefore, much of the respondent's testimony and evidence was not linked up. (See proffered testimony of Senator William Hiering and John Sweeney.)

Respondent appealed to the New Jersey Superior Court Appellate Division which reversed the conviction on the ground that the State had improperly and unconstitutionally sought and obtained a ruling that it could use the immunized Grand Jury testimony in cross-examination of the respondent at trial. Because of this decision the Superior Court Appellate Division did not address itself to the other issues raised by the respondent on appeal. Petitioner appealed as of right, and by way of petition for certification to the New Jersey Supreme Court. The appeal was dismissed and petition denied by the New Jersey Supreme Court. Thereafter the State of New Jersey filed a petition for certiorari to this Court.

REASONS FOR DENYING THE WRIT

Point I

The method by which the respondent invoked the privilege against self-incrimination was proper and was a matter of procedure of the courts of New Jersey and does not present a substantial federal question.

As the Appellate Division of the State of New Jersey pointed out, in its opinion below, respondent appeared on November 6, 1974 with counsel before the State Grand Jury investigating Robert Smertz (a target of State investigation) in response to a subpoena served upon respondent, on October 29, 1974, and expressed his intention of claiming the Fifth Amendment privilege against self-incrimination. Subpoenaed again for November 14, 1974, respondent was granted immunity in the following terms:

> "We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury. No representations have been made insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury, a separate Grand Jury from the one Mr. Portash is about to appear before."

Respondent was asked whether he understood the purport of this agreement.

> "Mr. Luciani: [Deputy Attorney General for the State of New Jersey who also acted as co-counsel during the subsequent trial of respondent] Mr. Portash, do you understand, have you discussed this matter with your attorney?
>
> Mr. Portash: I believe so.
>
> Mr. Luciani: And you understand the fact that nothing you are about to testify to can be used against you, personally, in any subsequent criminal prosecution?
>
> Mr. Portash: To the best of my knowledge of legal matters, yes."

Thereafter defendant Joseph Portash was indicted and brought to trial. After completion of the State's case, respondent requested a ruling from the trial court as to whether the State would be permitted to use his Grand Jury testimony in cross-examination in the event he chose to testify on his own behalf. The trial court availed itself of extensive argument consisting of over 150 pages of daily transcript covering two days. Following such argument, the trial court ruled that the State would be permitted to refer to respondent's Grand Jury testimony in its cross-examination if inconsistent responses were elicited.

The State correctly points out in its present petition that "the privilege against self incrimination is one which normally must be claimed by the individual who seeks to avail himself of it for his protection". *Communist Party of United States v. Subversive Activities Control Board,* 367 U.S. 1, 107 (1961). Respondent's right against self-incrimination entitles him to remain silent unless he chooses to speak in the exercise of his own will, and to suffer no penalty for such silence. *Brooks v. Tennessee,* 406 U.S. 602 (1891). In the case at bar, respondent's counsel and the State consumed 150 pages of transcript in an attempt to invoke the Fifth Amendment privilege against self-incrimination and the protection of the immunity statute. No clearer fact can be demonstrated from a reading of the transcript. The respondent refused to take the stand for the very purpose of protecting his Fifth Amendment privilege. Refusing to testify is in itself an assertion of the Fifth Amendment guarantee. That right is never lost unless voluntarily and intelligently waived. *Smith v. United States,* 337 U.S. 137 (1949).

No case cited nor known to this writer stands for the proposition that the defendant must take the stand in trial to invoke his Fifth Amendment privilege against self-incrimination. Indeed, the contrary rule prevails, that upon taking the stand to offer testimony, the defendant waives his privilege against self-incrimination. See *Smith, supra.* A witness may refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Lefkowitz v. Cunningham,* —U.S.—, 53 L. Ed. 2d 1 (1977).

The trial judge invoked the proper procedure by rendering a decision with respect to the question of the Fifth Amendment privilege against self-incrimination, covering the admissibility of the Grand Jury testimony which the prosecutor would be proffering. Rule Eight (8) of the *New Jersey Rules of Evidence,* vests in the court the power and imposes obligation upon the trial judge to make a determination as to conditions precedent involving areas of a witness' qualifications as to whether the existence of a privilege or the admissibility of evidence has been met. Such a ruling was sought in the instant case and the court, after extensive argument, rendered a decision which was subsequently reversed by the State's Appellate Division.

The trial court was obligated to use the procedure it employed to properly apprise the respondent of the full ramifications of his taking the stand. Indeed, case law is clear, that although the privilege against self-incrimination must be claimed and may be waived, the witness, after having claimed the privilege, can not properly be held to have waived such privilege and consequent immunity on vague and uncertain evidence inasmuch as waiver of constitutional rights is not to be inferred. In the case at bar, the State now urges that the respondent should be placed in the vague and uncertain atmosphere of not knowing the extent of his protection prior to taking the stand. Indeed, upon taking the stand, the respondent would have waived his right against self-incrimination without full knowledge of the extent of the waiver and the State would then be in a position to argue that the respondent had waived his Fifth Amendment privilege. See *Smith v. United States, supra; Gardner v. United States,* 424 U.S. 648 (1976); *Lefkowitz v. Turley,* 414 U.S. 70 (1973). See also *Garrity v. New Jersey,* 385

U.S. 93 (1967). That the procedure employed by the court was the constitutionally proper procedure cannot be doubted, inasmuch as the State properly failed to object to the procedure at trial and further failed to directly raise the issue at a subsequent appeal. The State now comes before the United States Supreme Court presenting a specious argument having no constitutional viability in an effort to color the question as a substantial federal question, in order to invoke the jurisdiction of this Court.

Moreover, the entire issue raised by the State in Point I of their petition does not raise an issue of substantial federal question. The issue raised can only be characterized as procedural in nature and certainly not one of substance. The substantive question of the extent of the Fifth Amendment privilege against self-incrimination and immunity is addressed in Point III of respondent's brief in opposition to petition for writ of certiorari.

Moreover, if the Court is of the opinion that the procedure used by the trial court was erroneous, we respectfully urge this Court to consider the fact that the decision of the court was a procedural matter and does not raise substantive issues, thereby not bringing the question itself within the jurisdiction of this Court. *U.S.C.S., Supreme Court Rules of Court, Rule 19.* Additionally, the respondent should not be penalized by the trial court's procedure in ruling upon an evidential question.

Based upon the foregoing, it is respectfully submitted that when a defendant takes the stand to testify, he waives his right against self-incrimination. The State argues that the defendant

must take the stand before he can raise his Fifth Amendment protections. *Gardner v. United States.*, 424 U.S. 648 (1976). It is interesting to note that in the *Gardner* case however, the defendant voluntarily gave evidence without claiming his Fifth Amendment privilege. In the case at bar, the respondent claimed his Fifth Amendment privilege by refusing to testify based upon the ruling of the trial court, and thereby did not waive his privilege. The argument of the State creates a Hobson's Choice which has been resolved by the courts of New Jersey in the instant matter. *Garrity v. New Jersey,* 385 U.S. 493 (1967).

The Supreme Court of the United States decided the procedural versus a substantial federal question, in *Duncan v. Tennessee,* 405 U.S. 127 (1972), wherein certoriari was granted by the United States Supreme Court to consider questions seemingly presented under constitutional guarantee against double jeopardy, but, after review it appeared that such questions were so interrelated with the rules of the criminal pleading, particular to the State of Tennessee, the constitutionality of which was not at issue, as not to warrant an exercise of certoriari jurisdiction of this Court, and the writ was dismissed as having been inprovidently granted. The Supreme Court of the State of New Jersey has similarly decided with regard to the rule-making process of the court as contrasted to substantial questions. See *Winberry v. Salisbury,* 5 N.J. 240 (1950).

Point II

The decision rendered by the New Jersey Appellate Division was based upon the interpretation of the New Jersey statutes in relation to the New Jersey Constitution and as such does not present a controversy to come within the juridiction of the Supreme Court of the United States.

The New Jersey Appellate Division in rendering its decision made specific reference to the statutory basis upon which it was predicating its ultimate resolution of the dispute. That court in interpreting the granting of immunity given pursuant to N.J.S.A. 2A:81-17.2a2 stated:

> "A valid claim of the Fifth Amendment privilege against self incrimination made before a grand jury will, of course, be honored and the witness claiming cannot be required to testify. Because of the imperatives of investigation, however, the device of immunizing such testimony from later use against the witness in a subsequent criminal proceeding was fashioned as a means of compelling such otherwise privileged testimony without compromising the integrity of the constitutional protection afforded by the Fifth Amendment and cognate state constitutional guarantees. The immunity device, however, will only be deemed a sufficient answer to a claim of privilege if the scope of immunity afforded is commensurate in all respects with the privilege against self incrimination which it replaces.

> Citing *United States v. Calandra*, 414 U.S. 338, 346 (1974); *Kastigar v. United States*, 406 U.S. 441, 459 (1972)." 151 N.J. Super. 200, 205 (App. Div. 1977).

It is apparent from the foregoing that the Appellate Division based its decision not only on the Federal Constitution but also the State constitutional guarantees as they apply to New Jersey statutes.

It has been clearly held by the United States Supreme Court that the State courts are permitted and should be the sole arbiter of their State statutes and their State Constitutions as long as such interpretations do not afford a defendant with a lesser protection than the United States Supreme Court's interpretation of the United States Constitution. *State v. Johnson*, 68 N.J. 350 (1975); *Del Vecchio v. Bowers*, 296 U.S. 190 (1935).

The United States Supreme Court is not vested with jurisdiction to pass upon the expediency, wisdom, or justice of the laws of the State as declared by their courts, but only to determine their conformity to tne Federal Constitution and the paramount laws enacted pursuant to it. *Twining v. State of New Jersey*, 211 U.S. 78 (1908). No such claim is urged by the State. State courts are the final arbiters of their State's own laws. *Wardius v. Oregon*, 412 U.S. 470 (1973).

The United States Supreme Court must accept the construction of a State statute which the highest court of the State has put upon it. *Groppi v. Wisconsin*, 400 U.S. 505 (1970).

The construction of a State statute by the State's highest court is binding on the United States Supreme Court. *Einsenstadt v. Baird,* 405 U.S. 438 (1972).

In the case at bar, the New Jersey Superior Court, Appellate Division, rendered a decision interpreting a State statute in the light of the State constitutional guarantees. That decision was appealed by the State of New Jersey and petition for certification was addressed to the New Jersey Supreme Court, requesting that the Appellate Division be reversed. The New Jersey Supreme Court refused that request, denied the appeal and dismissed the petition. The New Jersey court's decision interpreting its statute in light of its Constitution is entitled to respect from the United States Supreme Court. The interpretation placed by the New Jersey courts should not be deemed to be a lesser standard than that which has been employed by the United States Supreme Court, as it affords coextensive protection guaranteed by the United States Fifth Amendment privilege from self-incrimination and is not inconsistent therewith. The decision of the New Jersey courts as it applies to the New Jersey statutue and the New Jersey State Constitution does not provide a substantial federal question to permit the State to come before the United States Supreme Court and seek relief, therefore, the State of New Jersey has no standing in this matter.

Point III

The State should not be permitted to impeach a defendant at subsequent criminal trial with defendant's prior immunized Grand Jury testimony compelled by the State on investigation of identical matter.

The State compelled the respondent by service of subpoena to appear before a State Grand Jury. The respondent invoked his United States and New Jersey State constitutional privileges against self-incrimination. The State Attorney General's office through Assistant Attorney General, Alfred Luciani, granted immunity under the New Jersey State Public Employee Immunity statute, N.J.S.A. 2A:81-17.2a2, in the following terms:

> "We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury."

The Attorney General then questioned Mr. Portash:

> "Mr. Luciani: Mr. Portash, do you understand — have you discussed this matter with your attorney?
>
> Mr. Portash: I believe so.

> Mr. Luciani: And you understand the fact that nothing you are about to testify to can be used against you, personally, in any subsequent criminal prosecution?
>
> Mr. Portash: To the best of my knowledge of legal matters, yes."

Notwithstanding the promises and representations made by Mr. Luciani when granting the immunity to respondent, at the subsequent trial, Mr. Luciani urged that the State could use the immunized Grand Jury testimony and statements derived therefrom to impeach respondent's credibility by the use of any inconsistent statements made pursuant to respondent's grant of immunity. Respondent gave a number of statements under the Public Employees Immunity Statute which compelled such testimony. Mr. Luciani was aware that the statute in question and the United States Constitution prohibited the use at trial of immunized testimony in any fashion and correctly quoted the substance of the law to Mr. Portash when granting him immunity compelling him to testify before the Grand Jury. Thereafter, when it suited the State's purposes to utilize the immunized statements against repondent, the State sought to urge upon the court an interpretation of the law, contrary to the plain meaning of the statute; an interpretation which was completely contrary to the promises and representations of the Deputy Attorney General to respondent. The State conceded at trial that respondent's prior statements given under the grant of immunity had been factual and truthful, and points out in its brief that respondent never alleged that the statements were false in any regard. The State's brief deals with irrelevant propositions

of law dealing with the investigative powers of the Grand Jury. Respondent makes no dispute with respect to those propositions of law cited, indeed, he cooperated with the Grand Jury and testified after being given immunity.

Simply stated, the issue before this Court is whether immunized testimony may be used against a defendant in a subsequent criminal trial for a charge other than perjury or false swearing. This Court has ruled that if an immunity statute is to be constitutional, the protection afforded a witness who is granted immunity must be co-extensive with the privilege against self-incrimination itself. See *Kastigar v. United States,* 406 U.S. 441 (1972).

In *Kastigar, supra,* at 453, Justice Powell rendering the majority opinion stated:

> "We hold that such immunity from use and derivitive use is co-extensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader . . . Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.' (citing *Ullman v. United States,* 350 U.S. at 422 (1956) which quoted *Boyd v. United States,* 116 U.S. 616, 634 (1889).) Immunity from the use of compelled testimony,

> as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* (emphasis in original) respect, and it therefor insures that the testimony cannot lead to the infliction of criminal penalties on the witness."

In *Murphy v. Waterfront Commission,* 378 U.S. 52 (1964) the Court in construing another New Jersey Immunity statute at page 79 states:

> "A state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with the criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating a prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."

To the same effect see *United States v. Calandra,* 414 U.S. 338 (1974).

In *Kastigar, supra,* beginning at page 459, the Court discussed the difficulties raised by identifying information obtained either by testimony or cross-examination which compelled testimony may disadvantage a witness, especially in the jurisdiction granting immunity. The Court indicated that the burden would then shift, stating:

> "This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

See also *Lefkowitz v. Turley,* 414 U.S. 70 (1973), wherein Justice White writing the majority opinion for the Court stated:

> "[But] the state may not insist that appellees waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them. Rather, the State must recognize what our cases hold: That answers illicited upon the threat of the loss of employment are compelled and inadmissible in evidence. Hence, if answers are to be required in such circumstances States must offer to the

> witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity."

The immunity required to supplant the privilege is that which will place the respondent in the same position he would have been in had he not been compelled to testify. *Kastigar, supra,* at 462. In the instant case, of course, had the respondent not been compelled to testify by the granting of the immunity herein there would be no statement available with which to cross-examine the defendant about possible inconsistencies to impeach his credibility.

As the opinion of the Superior Court of New Jersey, Appellate Division states:

> "The essential inquiry here, therefore, is whether the proposed use of the immunized Grand Jury testimony to impeach defendant's trial testimony would leave defendant and the State in the position each would have occupied had defendant's claim of privilege been honored. That inquiry can only be answered in the negative. Had defendant been permitted to refuse testimony before the grand jury on his claim of privilege, the present argument by the State could not even have been made; no testimony to be used for impeachment purposes would have existed. Had defendant's testimony not been compelled, he would have been able to testify at his trial free from the fear engendered by the

> possible use of prior inconsistent testimony for purposes of impeachment. It necessarily follows that if the grant of immunity is to be viewed as commensurate with the lost privilege against self-incrimination, than he should be accorded the same freedom to testify in his own behalf at trial as he would have enjoyed had he been permitted to remain silent before the grand jury."

The court continued:

> "A similar issue was considered and disposed of in *United States v. Hockenberry,* 474 F. 2d 247 (3 Cir. 1973). In *Hockenberry,* the prosecution used immunized Grand Jury testimony given by *Hockenberry* to impeach his credibility at his trial on a charge of some other wrong doing. The conviction was reversed on the grounds that the immunized testimony could not be so used without jeopardizing the adequacy of the immunity as a Constitutional means of compelling self-incriminatory testimony. The court in *Hockenberry,* observed in terms pertinent to the present matter: 'But for the grant of immunity *Hockenberry* would have been privileged to refuse to admit to the Grand Jury his wrong doing in the execution of Affidavits to obtain search warrants. And if immunity that deprived him of that privilege is to be, as constitutionally it must, co-extensive with the privilege itself, his compelled admission of wrong

doing cannot later be used to discredit his efforts to defend himself against the charge of some other wrong doing (*id* at 250)'. In this case, unlike *Hockenberry*, the immunized testimony was sought to be used to discredit defendant's effort to defend himself with respect to the very matters about which his testimony was compelled. The argument for excluding such testimony is, therefore, even more compelling in this case than it was in *Hockenberry*. *Portash, supra* at 205." (See also *Lefkowitz v. Cunningham*, —U.S.—, 53 L. Ed. 2d 1, 4 (1977).

The State contends in its recitation of the statute in question that inadequate remedy is at hand for penalizing the respondent in the event of perjury committed during his trial testimony. The contention is invalid. If the State believes that respondent testifies untruthfully at trial an indictment charging respondent with perjury or false swearing can be sought by the State and the immunized testimony and also respondent's trial testimony may be introduced to prove a case of perjury or false swearing. Such relief is clearly provided in N.J.S.A. 2A:81-17.2a2. Also, in the event that the State contended that the immunized Grand Jury testimony was perjured, respondent would not have been considered to have given it under immunity and it could be utilized against him free from the privilege accorded by the statute. See *United States v. Wong*, —U.S.—, 52 L. Ed. 2d 231 (1977) and *United States v. Mandujano*, 425 U.S. 564 (1976). Neither case pertains to the case at bar. In the instant matter, the State conceded that the testimony was truthful at the Grand Jury level but requested and obtained a

ruling from the trial court which prevented the defendant from taking the stand in the subsequent trial. *Lefkowitz v. Cunningham*, —U.S.—, 53 L. Ed. 2d 1 (1977).

The trial court's ruling to allow the State to use immunized Grand Jury testimony had a clear chilling effect on the respondent's right to take the stand. The case is clear that the State in the instant matter attempted to prevent the respondent, Mr. Portash, from defending himself at trial by the strategem of granting him immunity and compelling him to testify before the Grand Jury on the same matters upon which his case was presently pending before another Grand Jury from which the Attorney General's office subsequently requested an indictment. The impropriety here relates in part to the State's attempt to effectively deprive the respondent of his right to trial by jury, not on the basis of perjured testimony, because the State conceded that defense counsel's statement at trial that respondent's testimony before the State Grand Jury was true, but, on the basis that the State would be armed for the purposes of cross-examination with prior inconsistent statements which could arise merely because of the vagary of memory in any witness with the passage of time. The State attempted to use this compelled testimony in an unconstitutional fashion at trial. The courts of New Jersey have rejected the State's attempted use of such testimony.

CONCLUSION

For these reasons, a writ of certiorari requested by the State of New Jersey should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
AUG 25 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1489

STATE OF NEW JERSEY,

Petitioner,

v.

JOSEPH S. PORTASH,

Respondent.

On Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1489

STATE OF NEW JERSEY,

Petitioner,

v.

JOSEPH S. PORTASH,

Respondent.

On Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR THE PETITIONER

Opinions Below

The following opinions of the state courts were previously reproduced in the appendix to the Petition for Certiorari: the Orders of the Supreme Court of New Jersey denying certification and dismissing the appeal, reported at 75 N.J. 597, 384 A.2d 827 (1978); the opinion

of the Superior Court of New Jersey, Appellate Division reported at 151 N.J. Super. 200, 376 A2d 950 (1977), and the unreported judgment of conviction of the Superior Court of New Jersey, Law Division.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on January 17, 1978, and the petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. May a defendant invoke the benefit of the privilege against self-incrimination without having properly asserted it at trial?

2. Does the privilege against self-incrimination shield a defendant from impeachment of his trial testimony with his materially inconsistent statements given after he was granted immunity?

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment V

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *

New Jersey Public Employees Immunity Statute, N.J.S.A. 2A:81-17.2a2[1].

[1] The statute was subsequently amended, L. 1975, c. 246 §2, to alter its self-executing nature.

> If any public employee, having claimed the privilege against self-incrimination, testifies before any court, grand jury or the State Commission of Investigation after having been informed that his failure to appear and testify would subject him to removal from his office, position or employment, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury or false swearing committed while so testifying.

Statement of the Case[2]

Respondent Joseph S. Portash was prosecuted for misconduct in office (contrary to N.J.S.A. 2A:85-1) and extortion by a public official (contrary to N.J.S.A. 2A:105-1).[3] During the period at issue Mr. Portash was a member of the Ocean County Board of Chosen Freeholders (the executive branch of county government), mayor of Manchester Township, Executive Director of the Pinelands Environmental Council (responsible for planning the development of thousands of acres of virgin land in southern New Jersey) and a self-appointed member of the Manchester Township Municipal Utilities Authority (responsible for utilities in the developing township area).

[2] This statement will focus upon those facts specifically relevant to the issues presented.

[3] The indictment is reproduced in the Appendix to Respondent's brief submitted to the Superior Court of New Jersey, Appellate Division.

In September or October of 1972 Constance Kulpinski, an assistant bookkeeper at the Madison Agency, a realty and insurance brokerage firm in Lakewood, New Jersey, discovered that Mr. Portash had accepted approximately $31,730, less taxes, from Donald Safran, part-owner of the agency, for a "no-show" job. Aware that Robert Schmertz, the president of Leisure Technology, a large developer in the county and Manchester Township, was also a principal in the agency, Ms. Kulpinski reported her discovery to the police. (See 2T33-11 to 25).[4] Mr. Portash's employment at the agency was merely a conduit for illegal payments by Leisure Technology Corporation for favorable treatment by Mr. Portash in his capacity as a public official.

State Police Detective Raymond Feldherr was assigned to the investigation of this case and he first interviewed Mr. Portash on March 15, 1973 (2T139-20 to 2T140-5). In response to questions by the detective, Mr. Portash stated that he was earning $9,500 annually as Director of the Board of Freeholders; $12,000 annually as Executive Director of the Pinelands Environmental Council; $6,200 annually as Director of the First State Bank; and $3,000 annually as a member of the Manchester Township Municipal Utilities Authority. Respondent claimed that he had no other sources of income (2T140-23 to 2T141-9). He produced a letter (S-11), dated June 30, 1971, which purported to set forth the specific terms of his former employment relationship with Madison Agency (2T140-1 to 18).

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[4] Transcript citations will be either to the portions of the record reproduced in the joint Appendix (designated "A" followed by page and line numbers) or to the volume of the transcript as previously designated in the state court briefs, see respondent's Appellate Division brief at pp. 2-3 and its New Jersey Supreme Court brief at p. 2.

Significantly, Mr. Portash had not produced this letter at an earlier interview on November 22, 1972 with State Police Officer Hallock, although he had the occasion and opportunity to have done so (10T148-4 to 20). It was apparently drafted after Officer Hallock had interviewed Mr. Portash. Detective Feldherr had conducted a similar interview of Donald Safran on the same date. It was also a coincidence that Mr. Portash told Detective Feldherr that he resigned from the agency on November 28, 1972, only six days after the two interviews (2T139-22 to 141-20).

Further investigation revealed that the letter was contrived to explain respondent's receipt of large sums from Madison Agency, as demonstrated by other testimony presented at trial. The initials of the typist on the letter were "vsf," but the only secretary at the agency with those initials, Virginia S. Frank, testified that she never typed this correspondence. She observed that the letter was "very sloppy," and she could not imagine Mr. Safran allowing a letter in such condition to leave the office (4T7-17 to 4T10-5). Detective Feldherr, an expert in document analysis, compared the letter with others from the agency and concluded that it had no similarity in paper stock, type print, letterhead and format (3T62-13 to 72-3). Another secretary at the agency, Anne Marie O'Brien, added that the ink color and format on the letter were different from that used in the office (3T150-10 to 153-7).

At the March 15, 1973 interview Detective Feldherr inquired of respondent as to his 1972 earnings from the agency. Mr. Portash, who claimed that he had earned about $14,000, admitted that after resigning he had not repaid the $10,000 advance from the agency. He asserted that the amount was not an advance payment, as expressed in the letter of June 30, 1971 (S-11), but rather was a

loan. The detective had previously obtained this check (S-5A) from the bank and he confronted Mr. Portash with the fact that Federal withholding taxes, F.I.C.A. deductions and unemployment insurance had been subtracted from the gross amount. Respondent was asked twice why such withholdings were made if the money were a loan. According to Detective Feldherr, Mr. Portash was visibly upset and declined to answer the inquiry (3T59-13 to 61-8).

Subsequently, it was represented to State law enforcement authorities that Mr. Portash was willing to discuss the matter and cooperate with them (A52-2 and 3; A93-21 to 23). Accordingly, on October 29, 1974 the State Grand Jury subpoenaed certain documents from Mr. Portash relating to his employment at Madison Agency, including site evaluations. Mr. Portash appeared with another attorney at an *in camera* hearing on November 6, 1974 and for the first time indicated a reluctance to testify (A93-17 to 20). He objected to the subpoena on the ground that production of the documents would infringe his right against self-incrimination. The court rejected this argument and ordered Mr. Portash to produce and identify these documents before the State Grand Jury. Fearful that his client might be exposing himself to charges such as obstruction of justice for producing fabricated documents, Mr. Portash's attorney stated that his client would not represent their authenticity or accuracy (A4-10 to 22-10). Mr. Portash produced the subpoenaed documents and identified them before the State Grand Jury on the afternoon of the same date, November 6, 1974 (A23-1 to 27-20).

Pursuant to another subpoena Mr. Portash appeared with his counsel in an anteroom outside of the presence of the State Grand Jury on November 14, 1974 (A29-1 to 30-5). Since the State considered respondent's testimony desirable for the prosecution of Robert Schmertz and Leisure Technology (A93-23 to 94-20), the prosecution stated for the record its agreement to grant statutory immunity from use of any adverse evidence derived from "the testimony that Mr. Portash is about to give before the Grand Jury" in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury. Respondent's counsel noted that since the immunity statute was self-executing, this informal method of granting immunity was satisfactory. The prosecution also made it clear to Mr. Portash, however, that evidence had been presented to a separate grand jury and no representation was made insofar as prosecution for offenses committed as shown by that evidence (A30-1 to 31-16). Respondent then testified before the State Grand Jury.

The substance of his immunized testimony was restricted to the documents he had submitted on November 6, 1974, which he admitted were fabricated in November, 1972 after the State Police began investigating him. According to Mr. Portash, he had prepared some of these documents together with Donald Safran to substantiate his employment. Subsequently, they had met together with Mr. Schmertz and two lawyers, and the general consensus at the meeting had been that there had to be more records to justify the compensation he had been given. Mr. Portash believed that the lawyers had suggested preparing the records irrespective of their authenticity (A34-1 to 39-25). Asked if Mr. Schmertz knew that he was employed by Donald Safran, Mr. Portash replied that he was acquainted with Mr. Schmertz because they both were members of the bank board, and Mr. Schmertz occassionally asked "What are you doing;" "How are you getting along;" "Are you working hard?" and general conversation along these lines with specific reference to respond-

ent's employment at the Madison Agency (A40-2 to 25). Respondent had first met Mr. Schmertz at County Planning Board meetings in the early 1960's and had been offered jobs in the area. Eventually, Mr. Schmertz had offered him the position on the bank board and arranged for him to acquire the necessary shares by borrowing the money at a legal rate. Schmertz had also arranged for respondent to be employed at the bank as Director of Real Estate, which involved appraisal work (A46-14 to 48-7).

Mr. Portash also admitted before the State Grand Jury that one of the letters relating to his employment at Madison Agency which he had shown to Detective Feldherr (Exhibit SGJ16) had been prepared after the State investigation commenced and not at the time indicated on the letter. Respondent claimed that he did not type the letter, it had been sent from Mr. Safran and he (Portash) was under the impression that Safran's wife may have typed it (A40-30 to 41-23). Mr. Portash testified that he resigned from Madison Agency on the advice of his attorney. The prime factor was the pending investigation (A41-24 to 43-1).

Approximately two weeks after Mr. Portash's grand jury testimony, "charge bargaining" discussions took place to aviod the necessity of his indictment (See A100-1 to 34). These discussions incorporated several prerequisite conditions upon which there had been general agreement: Portash was to resign from his position as mayor of Manchester prior to January 1, 1975; he was expected to cooperate in the case including the prosecution of Schmertz and Leisure Technology, and most importantly from the State's viewpoint, he was to cooperate in the investigation of a contract between the Pinelands Environmental Council and Meridian Engineering which was deemed more significant in its impact than the instant case (A94-20 to 95-7; A100-34 to 101-3). Very soon after these

initial "charge bargaining" discussions, the State made it known that it would also require restitution of the amounts which Mr. Portash received through Madison Agency (A95-7 to 15).

Mr. Portash failed to honor his commitment to resign as mayor by January 1, 1975 (A95-15 to 20). Subsequently, there was a request to extend the date to February 1, 1975, to which the State reluctantly agreed. Mr. Portash, however, again failed to comply with this prerequisite (A101-3 to 5).

In a telephone conversation with the investigating deputy attorney general on the evening of February 4, 1975, Mr. Portash's attorney vehemently opposed restitution of the full amount of the money his client had received after taxes, *i.e.* $24,322, arguing that the sum was just too high. This impasse was later discussed with the Director of the State Division of Criminal Justice, who conceded that the money differences could be resolved. It was decided that in the meantime the Portash prosecution would be deferred but they would proceed as scheduled to obtain the indictments against Schmertz and Leisure Technology (A95-20 to 96-3). As a condition of holding off on Mr. Portash's indictment, however, a statement was taken from him the next day, February 5, 1975, in anticipation of his cooperation in the Schmertz trial (A85-32 to 86-10; A90-5 to 26). Thus, the statement of February 5, 1975 was given as a part of the charge bargaining negotiations; there is no indication that it was given under an extended grant of statutory immunity.

This statement of February 5, 1975 generally concerned the circumstances of Portash's employment with the Madison Agency and favorable treatment accorded to Leisure Technology. It included a significant admission by Mr. Portash:

> Q. Did you know at that time when you originally accepted the offer that Mr. Schmertz had an interest in Madison Agency?
>
> A. No, not initially. I didn't know until about two weeks later (A59-27 to 30).[5]

He also admitted correlating in his own mind his employment at Madison Agency and Leisure Technology's application to the Utility Authority for a franchise, stating that it gave him an awkward feeling that he was being used. He felt "obligated to the corporation . . . [b]ecause of the employment at the Madison Agency." (A66-20 to 68-22). According to his statement, "it was a contributing factor to his decision on the franchise application (A68-23 to 27). Finally, he again acknowledged fabricating some of the site applications (A72-19) and the letter justifying his $15,000 annual salary at Madison Agency (A75-16 to 76-4).

Later in February 1975, Mr. Portash met twice with another deputy attorney general assigned to handle the Schmertz trial to review his anticipated testimony in that case (A99-25 to 33). Mr. Portash's attorney also met with the investigating deputy attorney general to discuss the question of restitution. At that time Mr. Portash's attorney indicated that the money question could be negotiated; he also discussed Mr. Portash's mental state as well as the terms of his resignation (A95-7 to 96-13). There followed some telephone conferences (A101-12), and during the next

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[5] In his Appellate Division brief respondent Portash represents that if he had testified at trial, "he would have indicated that he had no knowledge of any connection between Leisure Technology and the Madison Agency at the time of his employment and indeed never learned of the fact that Schmertz [*sic*—Safran] had an equal but silent partner during his employment." (Respondent's Appellate Division brief at p. IV). He makes the same representation in his Brief in Opposition to Petition for Certiorari at p. 6.

two or three weeks the State indicated that if it settled the restitution question for $15,000, as proposed by Mr. Portash's attorney, the State would require Mr. Portash to resign from his position as Executive Director of the Pinelands Environmental Council (A86-19 to 88-9; A90-31 to 91-25; A96-18 to 30; A103-14 to 27). Otherwise the State would stand by its original offer to accept $24,322, resignation from the township committee and position of mayor, and cooperation in the Schmertz and Pinelands Environmental Council cases. The State added the alternative proposal in light of information received during preliminary discussions with Mr. Portash which justified his resignation from the other position of public trust (A96-30 to 97-2).

On March 27, 1975 Mr. Portash's attorney met with the State's representatives to discuss the alternatives (A97-3 to 5; A101-14 to 17). A written document (S-1) incorporating the terms of the proposals was drawn up (A102-14 to 27). His attorney indicated that Mr. Portash was going away for a few days to think it over (A101-17 to 20). After Mr. Portash returned, his attorney contacted the State's representatives and asked them to talk directly with Mr. Portash. The investigating deputy reluctantly agreed to this extraordinary request and spoke with Mr. Portash on the telephone for over an hour. Mr. Portash indicated that he was troubled about making the right decision, asserting that he had done nothing wrong and that to return the money and resign would be too much for him to bear. Consequently, he rejected both alternatives and decided to defend against the charges (A97-7 to 98-11; A101-20 to 26).

The State, which had been led to believe by Mr. Portash's representations that he would cooperate and abide by the prerequisites throughout the course of the discussions, was left with no recourse but to present the case to the State Grand Jury. The indictment was returned on April 24, 1975 (A86-30 to 12; 98-11 to 99-15; A101-26 to 31).

Prior to trial on this indictment at a hearing on December 15, 1975, Mr. Portash's counsel moved for dismissal of the indictment or in the alternative for a ruling on the use of respondent's immunized testimony and subsequent statements. Defense counsel argued that the grant of immunity and charge bargaining negotiations constituted a form of contractual agreement which precluded the bringing of the indictment as long as his client cooperated with the State. Enforcement of the agreement would require exclusion of all evidence and the State would have no case. Pursuant to this agreement his client gave the statement on February 5, 1975 "to nail down his testimony, in anticipation that he was going to be a witness for the State in the matter of State versus the late Mr. Schmertz, Leisure Technology, and one Safran." (A84-1 to 89-6). In other words pursuant to this understanding his client gave this statement "for him to preserve the promise that he would not be indicted where he cooperated with the State." (A86-13 to 23). Counsel observed that his client was not indicted or named as a coconspirator at the time of the Schmertz indictment. The defense contended that the State did not act irrationally in this respect but in accordance with the negotiated agreement which had begun with the immunity grant and also included the statement of February 5. The defense asserted that the State, however, kept demanding more from Mr. Portash, and counsel questioned the Attorney General's authority to do this (A90-5 to 91-19).

The prosecution responded that Mr. Portash failed to comply with certain prerequisites of the negotiations, such as resigning as mayor by January 1, 1975. In essence the parties never came to a mutual agreement to avoid the indictment. Mr. Portash finally decided that he could not live with the prerequisite conditions and would rather contest the charges. Accordingly, the State felt compelled to proceed with the indictment (A93-12 to 102-13).

In rejecting the defense contention the court found that there was no promise or contract in the record precluding the indictment and in any event such a promise would not be enforceable (A106-6 to 109-34; A123-23 to 132-30). Counsel also argued that the indictment should be dismissed because his client was compelled to incriminate himself by complying with the State Grand Jury subpoena for certain employment records (A113-9 to 119-6). The State represented that except for records that were not privileged (*e.g.* corporate documents), were in the public domain (*e.g.*, opinion letters of the utilities authorities), or were in the possession of the State before Mr. Portash was subpoenaed, it had no intention of utilizing the materials obtained pursuant to the subpoenas (A119-24 to 121-5). The court accepted this representation and denied the defense dismissal motion (A121-17 to 31; A123-9 to 13).

Defense counsel then requested an anticipatory ruling on what evidence was excluded under the grant of immunity. He acknowledged that such evidence could be utilized to impeach respondent if he took the stand and perjured himself (A143-17 to 144-19). Counsel argued, however, that no testimony, documentation or any fruits of his client's appearance before the Grand Jury or his statement of February 5 could be used otherwise either on cross-examination or in rebuttal (A144-22 to 28). The prosecution replied that it would proceed on the assumption that every witness who takes an oath testifies truthfully, and the court was not capable of making an anticipatory ruling on what evidence could be used against respondent if he should choose to take the stand. Nevertheless, the State contended that if Mr. Portash takes the stand, he waives all immunity and the State can use any legitimate evidence to attempt to impeach his credibility. The State should be allowed to pursue in cross-examination any avenue that the defendant testifies to on his direct case. Otherwise, the court would be condoning perjury (A144-30 to 145-24).

The court noted the vagueness of the anticipatory ruling which defense counsel was requesting, and it observed that it was not permitted to make advance pretrial evidentiary rulings except for a motion to suppress under the Fourth Amendment. The only way it could feasibly make such a ruling would be to conduct a "dry run" of Mr. Portash's testimony out of the presence of the jury, which in essence would require counsel to try his case twice. Although defense counsel encouraged the court to conduct such a pretrial *voir dire*, it refused to grant such an unprecedented request in contravention of the normal evidentiary procedure (A145-25 to 148-19). After summarizing the rule in *Harris* v. *New York*, 401 U.S. 222 (1971), the court concluded:

> So this Court would hesitate to make a pronouncement first, as to what can be used and what can't be used. Secondly, this Court would hesitate to have a dry run of direct examination and cross examination, because then, depending upon the Court's ruling, the Court may have heard one version of what's taken place, and then after the Court has made its ruling, a Jury might hear another version of what has taken place; and if the fundamental aspect of a trial be a search for truth, that would be an aberration from the search for the truth. So the one thing the Court can say is, that it can make no evaluation, no anticipatory ruling, as to what may be admissible. I am inclined to think the rule, the Harris rule, is a proper one, utilized for the sole purpose of impeaching credibility and not as substantive evidence (A151-4 to 19).

The court made it clear that it would never permit the use of a collateral statement; under the rules of evidence the inconsistency must be material to the testimony (A152-6 to 153-6). Asked by defense counsel if the court was saying "we will face it when we get there?", the court replied "That's the only thing I can say." (A153-7 to 9). Following this hearing respondent obtained another attorney who was duly substituted as trial counsel.

The defense renewed its request for an anticipatory ruling on February 5, 1976, after completion of the State's case, arguing that truthful immunized testimony should be excluded from any use whatsoever and suggesting that the prosecution should be confined to questioning defendant on his limited direct testimony (A158-1 to 162-33). The prosecution noted that the court was faced with three possible situations: respondent might repudiate his prior testimony as untruthful in whole or part; he might testify in accordance with prior truthful statements, which created no problem; or he might state that the prior statements were truthful but would testify falsely at trial. Assuming that the court was faced with the last situation, then the State maintained he would be giving advance notice of the intent to perjure himself at trial, which would be a fraud perpetrated on the court in an attempt to secure a deliberately false judgment. The prosecution argued that this situation fell within the ambit of the *Harris* rationale and also noted that if defense counsel knowingly participated in such a fraud, he would be subjecting himself to disciplinary action (A164-20 to 165-16).

Defense counsel protested that his client would testify only to the truth, would not discuss his grand jury testimony in any way and that, in any event, the only remedy for false testimony would be a subsequent prosecution for perjury or false swearing, citing *United States* v. *Hockenberry*, 474 F.2d 247 (3 Cir. 1973) (A168-10 to 169-3; A171-15 to 28). The court reiterated that respondent would be protected against use of non-material cross-

examination (A172-12 to 14). The court questioned whether the scope of an *Evidence Rule* 8[6] evidentiary hearing could include counsel's contentions on the scope of cross-examination (A172-27 to 33).

The prosecution noted that if the defense representations were accurate that respondent would testify truthfully, the whole discussion was academic since the State would not attempt to cross-examine him with his prior statements (A197-28 to 198-3). The court stated that it would defer ruling and handle the matter on a question-by-question basis, requiring questions related to the grand jury testimony to be first posed at side bar for a specific ruling (A198). The prosecution explained that it was seeking permission to utilize material inconsistencies between respondent's sworn testimony before the grand jury and at trial under the rationale of *Harris* v. *New York*, 401 U.S. 222 (1971) and state cases which followed the *Harris* rule (A199). The court opined that it was a new area of law and the court was inclined to believe that if the Supreme Court were to decide the issue, it would say that the shield provided by the immunity statute cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances (A201).

Further argument was heard in chambers on February 9, 1976 regarding the scope of cross-examination if respondent testified on his own behalf. Defense counsel stated that he could not advise his client to take the stand because he (counsel) was confused and unclear about the prior ruling. Noting the extent of the grand jury testimony, the evidence derived from it and respondent's subsequent statements, counsel contended that it would be "nightmarish" for the court to determine consistency and

[6] See footnote 7, *infra* p. 22.

inconsistency unless the court first conducted a *voir dire* of respondent's testimony and made advance rulings on the prosecutor's questions. In the absence of such a hearing his client would be exercising his rights in a vacuum (A214-1 to 217-16). The prosecution objected to a "trial run" of respondent's testimony or to any attempt by respondent to curtail effective cross-examination based on the State's case-in-chief by limiting the scope of respondent's direct examination (A217-28 to 219-17). The court observed that respondent could be cross-examined about anything reasonably related to evidence in the case-in-chief separate and apart from the grand jury testimony, and that the court could not give an advance evidentiary ruling on every question posed (A224-10 to 225-32; A230-1 to 5).

Following a recess defense counsel announced that he could not advise his client to take the stand in light of the court's ruling (A236-9 to 25). Counsel renewed his request for a *voir dire* of defendant's testimony, and the court responded:

> What you're asking the Court for is plenary, evidentiary rulings in advance which the Court, even if it were inclined to do so, is not permitted. There is no such thing as a dry run in a criminal case (A242-1 to 10).

The colloquy ended with a representation by defense counsel that it was defendant's decision not to take the stand (A245-26). Respondent was subsequently found guilty by the jury of extortion and was given a suspended sentence.

On appeal the Superior Court of New Jersey, Appellate Division held that although the evidence supported the jury's verdict of respondent's guilt, the trial court's ruling which would have permitted the State to use respondent's

immunized grand jury testimony for impeachment purposes had impaired respondent's right to testify on his own behalf. The Appellate Division found that in reliance on the trial court ruling and fearful of the use to which the grand jury testimony would be put, respondent decided against testifying. It, therefore, reversed the conviction and remanded for new trial. On January 17, 1978, the Supreme Court of New Jersey dismissed the State's appeal as-of-right and denied the State's petition for certification.

Summary of Argument

I. The record demonstrates that respondent's motions for an anticipatory evidentiary ruling to limit the scope of cross-examination on his proposed trial testimony and preclude use of his preindictment statements given after the grant of statutory "use plus fruits" immunity were premature and not properly cognizable. The request was first made before trial and then later after the State's direct case. The trial court properly declined to make such an unauthorized, advance evidentiary ruling. Since respondent failed to assert his claim based on the United States Constitution at the proper time and never testified on his own behalf at trial, there was no cognizable impairment of his constitutional rights presenting a justiciable controversy. *Garner* v. *U.S.*, 424 U.S. 648 (1976); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Communist Party of U.S.* v. *S.A.C.B.*, 367 U.S. 1 (1961). The state appeals court erred in anticipating a federal constitutional question in advance of any necessity compelling such a decision, and it formulated an abstract rule broader than required by the precise facts to which it applied. *Rescue Army* v. *Municipal Court*, 331 U.S. 549 (1946).

It is specious for respondent to claim that the trial court's ruling chilled his right to take the stand, since he had no right to commit perjury and the trial court's deferred ruling created no irreparable injury. See *U.S.* v. *Grayson*, —— U.S. ——, 98 S.Ct. 2610 (1978); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

II. While not admissible to prove the accused's guilt, testimony given pursuant to a statutory grant of immunity or as the result of charge bargaining negotiations may be utilized to impeach credibility under the rationale of *Oregon* v. *Hass*, 420 U.S. 714 (1975) and *Harris* v. *New York*, 401 U.S. 222 (1971). The Appellate Division's expansive interpretation of the privilege against self-incrimination barring the State from utilizing prior inconsistent immunized testimony either for impeachment purposes at trial or for a potential prosecution of perjury committed by respondent at trial was a misapplication of the principles enunciated in *Kastigar* v. *United States*, 406 U.S. 441 (1972). It erroneously insulated respondent from any effective sanction against such potential perjury. Since perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings, effective restraints against this type of offense are imperative. *U.S.* v. *Mandujano*, 425 U.S. 564 (1976).

If the defendant voluntarily takes the witness stand, he waives his privilege against self-incrimination, he is under an obligation to speak truthfully and accurately, and he has no protected right to commit perjury. *Brown* v. *U.S.*, 356 U.S. 148 (1958); see also *U.S.* v. *Grayson*, —— U.S. ——, 98 S.Ct. 2610 (1978). It does no violence to the privilege that a person's choice to testify opens the door for impeachment with such otherwise inadmissible evidence. See *McGautha* v. *California*, 402 U.S. 183 (1971). The shield of immunity should not be perverted into a license to commit perjury before a grand jury or trial

court free from the risk of confrontation with the prior inconsistent utterance. See *Oregon* v. *Hass, supra; Harris* v. *New York, supra.* The security of the community, regard for the integrity of the judicial process and the ultimate purpose of the trial to ascertain truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination. *Brown* v. *U.S., supra.*

The intent of the privilege is to preclude use of involuntary confessions because of probable unreliability, the insistence on requiring the government to prove guilt without invasion of privacy, and abhorrence of official illegality. *Blackburn* v. *Alabama,* 361 U.S. 199 (1960). Unlike a coerced confession, however, an immunized statement is expected to be truthful, for the reasons to falsify are removed. It is conceded that the government cannot use an immunized statement to prove its case. However, the statement, obtained through time honored, legal means, is usually reliable and should be admissible to impeach credibility. In any event, if it is unreliable it certainly is not entitled to protection. *Glickstein* v. *U.S.,* 222 U.S. 139 (1911).

The most damaging statement at issue in this case was not given under statutory use immunity but pursuant to "charge bargaining" negotiations several months after the grand jury inquiry. This statement of February 5, 1975 was the voluntary product of counselled respondent's free will and rational intellect, since he entered into the negotiations as the intelligent choice between available alternatives. It was not coerced with the threat of a contempt prosecution, its trustworthiness satisfied legal standards, and it was obtained in a legal manner. While the State properly made no use of the charge bargaining statement to prove respondent's guilt, the prosecution should be permitted to use it solely to impeach respondent even if the grand jury immunized statement is inadmissible.

LEGAL ARGUMENT

POINT I

Since respondent's motions for exclusion of the immunized testimony were premature and the State never utilized it against him at trial, the intermediate State Appeals Court erred in reversing the conviction on federal constitutional grounds.

The record demonstrates that respondent's motions for exclusion of his statements following the grant of immunity were premature and not properly cognizable. Respondent first requested an anticipatory evidentiary ruling on December 15, 1975 concerning the use by the State of his immunized testimony on cross-examination in the event he testified. While acknowledging that it could be used to impeach him if he perjured himself, he contended that it could not be utilized otherwise either on cross-examination or in rebuttal (A143-17 to 144-28). The prosecution replied, *inter alia,* that it would proceed on the assumption that a witness under oath testifies truthfully and it expressly objected to an advance ruling on what evidence was admissible against respondent if he chose to take the stand (A144-30 to 145-7). The court agreed with the prosecution, noting the vagueness of the defense request and observing that it did not have the authority to make pretrial evidentiary rulings except in the limited area of suppression under the Fourth Amendment. The court theorized that the only feasible way to make such a ruling would be to conduct a "dry run" of Mr. Portash's testimony which would contravene established practice (A145-25 to 148-19). In refusing to conduct such a *voir dire* the court noted that respondent might give different versions at an evidentiary hearing and later before a jury (A151-4 to 16).

When respondent's substituted trial counsel renewed the request on February 5, 1976 after the completion of the State's case, the trial court ruled that it would not permit the State to impeach respondent with inconsistent prior statements which were not material. Counsel then sought a ruling against enlargement of his client's testimony on cross-examination, but the court questioned whether counsel's request was beyond the scope of a *Rule* 8 evidentiary hearing[7] (T162-15 to 172-33). The trial court concluded that it would defer ruling and handle the matter on a question-by-question basis, requiring questions relating to respondent's immunized testimony to be first posed at side bar for his protection (A198-8 to 201-14). Of course respondent subsequently decided not to testify.

Thus, respondent was not being accurate when he contended before the Appellate Division that the trial court permitted the State to cross-examine respondent with his immunized grand jury testimony. In support of his claim that the ruling infringed his privilege against self-incrimination, respondent relied primarily upon such cases as *Kastigar* v. *United States*, 406 U.S. 441 (1972), and *United States* v. *Hockenberry*, 474 F.2d 247 (3 Cir. 1973), indicative that his claim was based on a mechanistic assertion of the Fifth Amendment of the United States Constitution. The State in its brief responded that since respondent's grand jury testimony was never utilized, his contention was "entirely academic and without foundation." The State further characterized the issue as "abstract, academic, hypothetical or speculative" and argued that to constitute a constitutional infringement, the claim "should be something more than mere form and assertion, without foundation (Petitioner's Appellate Division brief at pp. 15-17). The same contention was asserted before the State Supreme Court (Petitioner's State Supreme Court brief at pp. 11-14). Thus, respondent is incorrect when he asserts in his Brief in Opposition to Petition for Writ of Certiorari at p. 16 that "the State properly failed [sic] to object to the procedure at trial and further failed to directly raise the issue at a subsequent appeal."

[7] Respondent's reliance on *N.J. Evidence Rule* 8 in his Brief in Opposition to Petition for Certiorari at p. 15 is misplaced. This rule authorizes a preliminary inquiry by the judge "[w]hen the qualification of a person to be a witness, or the admissibility of evidence, or the existence of the privilege is stated in these rules to be subject to a condition. . . ." While such a hearing is to be held outside the presence of the jury before the privilege may be utilized, the rule does not contemplate an advisory ruling on abstract or hypothetical issues.

In reversing respondent's conviction the Appellate Division held that the immunity device:

> . . . will only be deemed a sufficient answer to a claim of privilege if the scope of immunity afforded is commensurate in all respects with the privilege against self-incrimination which it replaces. *United States* v. *Calandra*, 414 U.S. 338, 346, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *Kastigar* v. *United States*, 406 U.S. 441, 459, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). In order for a grant of immunity to pass constitutional muster as an adequate substitute for the self-incrimination privilege, it must leave the witness whose testimony has been compelled and prosecutorial authorities 'in substantially the same position as if the witness had claimed the Fifth Amendment privilege.' *Kastigar* v. *United States*, *supra* at 462, 92 S.Ct. at 1666. (151 N.J. Super. at 205, 376 A.2d at 953).

The Appellate Division opined that the proposed use of the immunized grand jury testimony to impeach respondent's trial testimony would not leave the parties in the position each would have occupied had respondent's claim of privi-

lege been honored. (*Id.*) In addition to this inaccurate conclusion the Appellate Division accepted respondent's assertion that he had "sought the trial court ruling under consideration as a basis upon which to decide whether to testify in his own behalf" and "[i]n reliance thereon, and fearful of the use to which the grand jury testimony would be put, he decided against testifying." Consequently, the Appellate Division held that the verdict was, therefore, based on partial evidence and reversal of the conviction was required. (151 N.J. Super. at 209, 376 A.2d at 955).

At the outset, it is apparent that respondent's contention [in his Brief in Opposition to Petition for Certification at pp. 18-20] that the Appellate Division decision was based upon its interpretation of the state constitution and statutes is not supported by that court's opinion. On the contrary, the court proceeded to consider the issue of the admissibility of the immunized testimony by construing federal constitutional requirements in light of *Kastigar* and *Hockenberry*. Indeed, the New Jersey Constitution contains no expressly comparable guarantee and there is no existent common law doctrine in New Jersey directly on the issue. It is therefore submitted that respondent's claim arises solely under the Fifth Amendment of the United States Constitution, and federal standards and procedural rules must govern in determining the sufficiency and temporal propriety of that claim. Under the facts set forth, petitioner submits that respondent has not satisfied the standards established by this Court for a valid assertion of the privilege against self-incrimination. As will be demonstrated, the proceeding involved no unfairness, and due process and Sixth Amendment rights were not implicated.

The Fifth Amendment addresses the compulsion of testimony from a witness. "It does not preclude a witness

from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *Garner* v. *United States*, 424 U.S. 648, 654-655 (1976); *United States* v. *Monia*, 317 U.S. 424, 427 (1943). The privilege against self-incrimination is one which normally must be claimed by the individual who seeks to avail himself of its protection. *Communist Party of United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 107 (1961). There, this Court recognized that "[m]erely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated." *Id.* at 71.

This Court has always advocated a policy of strict necessity in disposing of constitutional issues. See, *e.g.*, *Bowen* v. *United States*, 422 U.S. 916, 921 (1975). One factor in determining justiciability is the timeliness in raising and presenting constitutional issues. The Court has developed, for its own governance in the cases within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all of the constitutional questions pressed upon it for decision. *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-569 (1946); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (Brandeis, J. concurring at 346). Constitutional rules affecting legislation will not be determined ". . . in advance of the necessity for deciding them, in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which

the question may be avoided." *Rescue Army* v. *Municipal Court, supra* at 331 U.S. 569; *Ashwander* v. *Tennessee Valley Authority, supra* at 297 U.S. 346-348, and authorities cited.

In this case, however, the Appellate Division in construing N.J.S.A. 2A:81-17.2a2 in relation to federal constitutional principles erred in anticipating a federal constitutional question in advance of any necessity compelling such a decision, and improperly formulated a federal constitutional remedy not required by the facts in this case.

It must be emphasized that at no time did Mr. Portash take the stand on his own behalf. The trial court properly ruled that respondent had no right to an advance evidentiary ruling on the general scope of cross-examination prior to his testimony and he could not limit the inquiry on any matter in evidence. See generally, *McGautha* v. *California*, 402 U.S. 183, 214-216 (1971). It also properly refused respondent's unusual request for a *voir dire* hearing to preview his testimony. Petitioner submits that the trial court adopted the best course of action under the circumstances, deferring its ruling while the issue was abstract and hypothetical and requiring the prosecution to pose any question implicating immunized testimony at side bar out of the hearing of the jury for a ruling on admissibility. Respondent was protected by this procedure and it would have been appropriate for him to press his specific objections at the time when the judge could best and most expeditiously evaluate the issues in the full light of the evidence presented.

It was specious for respondent to argue that the trial court's "ruling prevented him from taking the stand," citing *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). (Respondent's Appellate Division reply brief at p. 4). In

Dombrowski the constitutional issues were presented in a distinguishable factual context. In the present case there was no bad faith harassment of respondent irreparably injuring his expression of constitutional rights.

Respondent voluntarily chose to adopt a strategy, sanctioned by the Appellate Division, which foreclosed proper consideration of the issue at trial. He represented that he had decided not to testify based upon the trial court's ruling. Since the trial court had deferred its ruling, however, it correctly pointed out that nothing could be further from the truth (A241-23 to 33). Even if the trial court subsequently had rendered a ruling which respondent deemed erroneous, his remedy was to testify truthfully and challenge the ruling on appeal. He had no constitutional right to take the witness stand and commit perjury while under oath. As this Court recently said in *United States* v. *Grayson*, —— US. ——, 98 S.Ct. 2610, 2618 (1978):

> The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath—unless we are to say that the oath is mere ritual without meaning. This view of the right involved is confirmed by the unquestioned constitutionality of perjury statutes, which punish those who willfully give false testimony. See *e.g.*, 18 U.S.C. §1621; *cf. United States* v. *Wong*, 431 U.S. 174, 97 S.Ct. 1823, 52 L.Ed.2d 231 (1977). Further support for this is found in an important limitation on a defendant's right to the assistance of counsel: counsel ethically cannot assist his client in presenting what the attorney has reason to believe is false testimony. See *Holloway* v. *Arkansas*, —— U.S. ——, —— n.4, 98 S.Ct. 1173, 1176 n.4, 55 L.Ed.2d 426 (1978); ABA Standards Relating to the Administration of Crim-

> inal Justice—The Defense Function §7.7(c), at 133 (1974). Assuming, *arguendo*, that the sentencing judge's consideration of defendants' untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury.

Furthermore, since respondent contended before the trial court that the proper remedy for his false trial testimony would be a prosecution for perjury rather than impeachment (*e.g.* A175-20), his assertion that the trial court's ruling had a "chilling effect" is certainly a *non sequitur*. A perjury prosecution is a high misdeamnor (felony) whereas the charges in this case carried a lesser penalty.

Under these circumstances it is submitted that respondent's decision not to testify was a pretext to avoid the prosecutor's cross-examination and manufacture a colorable issue in the event of his conviction. Such a strategic choice was not compelled by the situation. No potential infringement of the privilege could occur until the prosecutor propounded a question involving respondent's immunized testimony. Until then respondent's claim was of "a hypothetical or abstract character." See *Flast* v. *Cohen*, 392 U.S. 83, 100 (1968); *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). It is submitted that the Appellate Division erred in accepting respondent's alleged rationale for invoking his right not to testify at trial. Respondent had the opportunity to testify if he so desired.

Since respondent did not actually testify, it can only be speculated whether he genuinely intended to take the stand or even whether he might not have undergone a last-second change of heart if the court had ruled in his favor, particularly after it was made clear to him that by limiting

his testimony to certain matters he could not restrict the State's cross-examination with all the evidence in its case-in-chief. Until respondent took the stand and testified, it was impossible to anticipate the exact content of his testimony or delimit the scope of possible cross-examination based on such direct examination testimony. Thus, it would have been ineffective to conduct any sort of *voir dire* or trial run of respondent's intended testimony, as his counsel requested. It would have been impractical to determine whether respondent's prior statements would be inconsistent with this testimony, and premature to determine whether the immunized grand jury statement was true or false. See *United States* v. *Moss*, 562 F.2d 155 (2 Cir. 1977), *cert.* den. —— U.S. ——, 46 U.S.L.W. 3555 (No. 77-661, 1978) (discussed *infra*).

In conclusion, the claim raised by respondent arises solely under the Fifth Amendment of the United States Constitution, federal standards apply in adjudicating that claim, and no state procedural rule is pertinent. Under the facts set forth petitioner submits that respondent has not satisfied the standards established by this Court for a valid assertion of the privilege against self-incrimination.

POINT II

The State should be permitted to impeach a defendant's trial testimony with materially inconsistent statements given after the grant of immunity to preserve the integrity of the judicial system.

The novel issue presented by this case is whether the Fifth Amendment privilege against self-incrimination as it applies to the states under the Fourteenth Amendment shields a defendant's trial testimony from impeachment with materially inconsistent statements given after the grant of "use plus fruits" immunity. While not admissible to prove the accused's guilt, petitioner submits that prior immunized testimony should be admissible to impeach the accused's materially inconsistent trial testimony.

The trial court deferred its ruling on the admissibility of the statements given after the grant of statutory immunity. The court, however, took note of this Court's decisions in *Oregon* v. *Hass*, 420 U.S. 714 (1975) and *Harris* v. *New York*, 401 U.S. 222 (1971) and decisions of the New Jersey Supreme Court in *State* v. *Davis*, 67 N.J. 222, 337 A.2d 33 (1975) and *State* v. *Miller*, 67 N.J. 229, 337 A.2d 36 (1975). The trial court opined that it was inclined to believe that if the Supreme Court were to decide the issue presented, it would hold that the shield provided by the immunity statute cannot be perverted into a license to use perjury as a defense, free from the risk of confrontation with prior inconsistent utterances (A201). On appeal the Appellate Division held that the proposed use of the immunized grand jury testimony to impeach defendant's trial testimony would have violated the principles set forth by this Court in *Kastigar* v. *United States*, 406 U.S. 441 (1972). (151 N.J. Super. at 205, 376 A.2d at 953). The Appellate Division further held that it would not have

permitted the State to utilize the immunized testimony to charge respondent with perjury if he lied on the stand at trial. (151 N.J. Super. at 208, 376 A.2d at 954). Petitioner believes that the Appellate Division erroneously extended the holding in *Kastigar* and failed to take proper cognizance of the exception to the exclusionary rule enunciated by this Court in the *Hass-Harris-Walder* line of cases. The decision below insulates respondent from every effective sanction against potential perjury.

In *Kastigar* this Court reviewed the history of testimonial compulsion which is firmly established in Anglo-American jurisprudence. The duty to testify has long been recognized as a basic obligation that every citizen owes to his Government. The general common law principle that "the public has a right to every man's evidence" is particularly applicable to grand jury proceedings. *Id.* at 444; *United States* v. *Calandra*, 414 U.S. 338, 346 (1974). This power is necessary to assure the effective functioning of government since such testimony constitutes one of the Government's primary sources of information. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 93-94 (1964). More specifically, the grand jury occupies a special role in insuring fair and effective law enforcement; it does not adjudicate but investigates to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigatory power must be broad if its public responsibility is adequately to be discharged. *United States* v. *Calandra*, *supra* at 344-345; *Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972). The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered, even information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination. *United States* v. *Calandra*,

supra at 345-346; *Lawn* v. *United States,* 355 U.S. 339 (1958).

Of course, the grand jury's power is not unlimited. As explained in *Calandra,* the grand jury may consider incompetent evidence but it may not itself violate a valid privilege, constitutional or otherwise, such as forcing a witness to answer questions in violation of his Fifth Amendment privilege against self-incrimination. Rather, the grand jury may override a valid Fifth Amendment claim only if the witness is granted immunity co-extensive with the privilege against self-incrimination. 414 U.S. at 347; see *Kastigar* v. *United States, supra,* 406 U.S. at 450; *Murphy* v. *Waterfront Comm'n, supra,* 378 U.S. at 54; *Counselman* v. *Hitchcock,* 142 U.S. 547, 585 (1892). Immunity statutes seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. Their existence reflects the importance of testimony, and the fact that many offenses [such as bribery and extortion] are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. See *Lefkowitz* v. *Turley,* 414 U.S. 70, 82 (1973); *Kastigar* v. *United States, supra* at 446-447. Thus the intent is not to give a benefit to the recipient of immunity but to make available to the prosecution for public policy reasons evidence that could not otherwise be obtained.

The Court in *Kastigar* rejected the contentions that no immunity statute could afford a lawful basis for compelling incriminatory testimony or that to be co-extensive with the scope of the privilege the statutes must provide transactional immunity. 406 U.S. at 449-454. The Court emphasized that "[w]hile a grant of immunity must afford protection commensurate with that afforded by the privilege it need not be broader." 406 U.S. at 454. This Court

held that a statute providing use and derivative use immunity is consonant with Fifth Amendment standards. According to the Court, "[i]t prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Id.* It is unclear whether this prohibition on use of immunized testimony "in any respect" was intended merely to preclude use by the prosecution to prove guilt or whether it was intended to anticipate the issue in this case.

This Court has stated that the privilege against self-incrimination "does not condone perjury." *United States* v. *Wong,* 431 U.S. 174 (1977); See *United States* v. *Grayson, supra,* —— U.S. ——, 98 S.Ct. 2610, 2618 (1978). It grants a privilege to remain silent without risking contempt, but it "does not endow the person who testifies with a license to commit perjury." *United States* v. *Wong, supra; Glickstein* v. *United States,* 222 U.S. 139 (1911). As this Court held in *United States* v. *Mandujano,* 425 U.S. 564, 576-577 (1976), immunity supplants the privilege against self-incrimination and:

> [i]n this constitutional process of securing a witness' testimony, perjury has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are, therefore, imperative. * * * [O]ur cases have consistently—indeed without exception—allowed sanctions for false statements or perjury . . . Even where a statutory scheme granted blanket immunity from further use of the testimony, the

> Court has found perjured statements to fall outside the grant.

In *United States* v. *Freed*, 401 U.S. 601 (1971), the defendants had claimed that they were privileged to withhold certain evidence, despite the fact that it could not presently incriminate them, because it could conceivably be used against them if they committed an offense in the future. Rejecting the contention, Mr. Justice Douglas, writing for the Court, observed:

> Appellees' argument assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgression but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation. (*Id.* at 606-607).

Likewise, the respondent in this case is not entitled to an expansive interpretation of the privilege to protect him against his speculative claim of possible infringement.

Several federal court decisions are also instructive. In *United States* v. *Tramunti*, 500 F.2d 1334 (2 Cir. 1974), *cert.* den. 419 U.S. 1079 (1974), the defendant was prosecuted for perjury committed when he testified as a witness on his own behalf at a previous trial for conspiracy, mail and stock fraud. On cross-examination the Government sought to impeach Tramunti's testimony with a transcript of his testimony before a grand jury. It was discovered after trial that this testimony had been given under grant of use immunity. On appeal the Circuit Court explained that the theory of immunity statutes is that in return for the surrender of the Fifth Amendment right,

the witness is promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange. The bargain struck is conditional, however, upon the witness who is under oath telling the truth. According to the court,

> If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to protect. Thus, the agreement is breeched and the testimony falls outside the constitutional privilege. Moreover, by perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his past indiscretions. (*Id.* at 1342).

The court concluded that immunity does not extend *in futuro* to another crime not existing when the immunity was offered. It also rejected Tramunti's contention that the immunity statute should not be interpreted to permit the use of the testimony in other criminal trials not based on the original perjurious statements. Noting that there was authority that the listing of exceptions in the immunity statutes for subsequent criminal prosecutions is not intended to be an exclusive enumeration, the court held that "[t]he failure to include in the exceptions to the statute the use of false testimony to attack credibility or demonstrate the commission of prior similar acts does not prevent such use." (500 F.2d at 1345).

In accord with *Tramunti* is *United States* v. *Moss*, 562 F.2d 155 (2 Cir. 1977), *cert.* den. —— U.S. ——, 46 U.S.L.W. 3555 (No. 77-661, 1978). At issue in *Moss* was whether testimony given under the "use plus fruits" immunity provision of the Bankruptcy Act may be used for

impeachment purposes at a subsequent trial for the substantive offense of bankruptcy fraud if the defendant takes the stand and no objection to such use was raised. Relying on *Harris* v. *New York, supra* and *Walder* v. *United States, supra,* the prosecution contended that the immunized testimony could be used for impeachment on cross-examination even though it could not have been used as direct evidence. The court observed that the immunity grant does not protect perjury committed before trial under immunity any more than exclusionary rules protect perjury committed at trial. Since the appellant conceded that significant parts of this immunized testimony were perjured, the court held that the use immunity had been dissipated so far as the testimony was willfully false, and the acknowledgment by the defendant that it was perjurious rendered it usable at the trial on both the substantive offense and for perjury. In *dicta,* however, the court indicated its agreement with *United States* v. *Hockenberry, supra.*

Significantly, the prosecution in *Moss* was not for perjury, in which the jury determines whether the immunized testimony was perjurious directly by its verdict. On the substantive offense the perjury was collateral and not directly decided by the jury. The *Moss* court opined that to find in such a prosecution that particular immunized testimony was perjurious requires some preliminary finding of fact, or clear documentary evidence as in *United States* v. *Kahan, supra,* 415 U.S. 239, or as in both *Moss* and *Tramunti,* later objective proof. It left unresolved whether in the normal case a trial judge can resolve in advance, without conducting a mini-trial, that the immunized testimony was willfully false. (562 F.2d at 165). See also *United States* v. *Housand,* 550 F.2d 818, 822-823 n.8 (2 Cir. 1977), *cert.* den. 431 U.S. 970 (1977).

Both respondent and the Appellate Division relied on *United States* v. *Hockenberry, supra,* 474 F.2d 247, as authority precluding the use of immunized testimony for impeachment purposes. In *Hockenberry* the defendant, a former county detective, was charged with falsely testifying before the grand jury after receiving immunity. *Hockenberry* took the stand in his own defense and denied knowledge of or connection with bribes or payoffs to county detectives by persons engaged in unlawful gambling and prostitution. On cross-examination the Government impeached him with other truthful immunized grand jury admissions that he had falsely asserted personal knowledge of facts in search warrant applications. The issue was whether the trial court erred in permitting use for impeachment purposes of such truthful immunized testimony which was not material to the crime at issue. The court held that "the immunity statute properly permits prosecution for perjury committed in an otherwise immunized statement and also the introduction in evidence of so much of the statement as is essential to establish the *corpus delecti.*" (*Id.* at 249). It rejected, however, the Government's contention that it could use any truthful admission of wrongdoing made in an immunized statement to discredit the witness, since such an interpretation of the immunity statute would "jeopardize its adequacy as a constitutional means of requiring self-incrimination." (*Id.* at 250). Accord, *United States* v. *Frumento,* 552 F.2d 534 (3 Cir. 1977); *United States* v. *Housand, supra,* 550 F.2d 818; see also *United States* v. *Patrick,* 542 F.2d 381 (7 Cir. 1976), *cert.* den. 430 U.S. 931 (1977).

Petitioner submits that *Hockenberry* is factually distinguishable since it was primarily concerned with the use of non-material immunized testimony containing a truth-

ful admission of wrongdoing.[8] See Comment, "The Fifth Amendment And Compelled Testimony: Practical Problems In the Wake of *Kastigar*," 19 Villanova L.R. 470, 484-485 (1974).

Furthermore, it is contended that the restriction on the prosecution to the use of false immunized testimony in *Hockenberry* is not well founded. The State argued before the trial court that if respondent were representing that his immunized testimony was truthful but he intended to commit perjury at trial, this situation plainly fell within the ambit of *Oregon* v. *Hass* and *Harris* v. *New York*. According to the prosecution, the situation was even more blatant than in the *Hass-Harris-Walder* cases because the court was given advance notice that respondent intended to per-

[8] Respondent incorrectly alleges in his Brief in Opposition to Petition for Certiorari at pp. 22 and 28-29 that the State conceded that his immunized testimony was truthful and that the State requested and obtained a ruling from the trial court which prevented him from taking the stand at trial. Examining the record, it is apparent that it was the defense that requested an anticipatory ruling, at first conceding on the record that if Mr. Portash took the stand and committed perjury, he could be impeached with his prior inconsistent statements given after the grant of immunity (A144). When the substituted trial counsel renewed the defense motion on February 5, 1975, the State responded that the court was faced with three possible situations: respondent might repudiate his prior testimony as trutnful in whole or part; he might testify in accordance with prior truthful statements, which created no problems; or he might admit that the prior statements were truthful but he would testify falsely at trial. The deputy attorney general stated, "perhaps [defense counsel] could explain them to me or explain which one we have here because I don't know." (A164 to 165). It was consistently the State's position that in a perjury prosecution it did not have to prove which of two statements given under oath was false, and this position was expressly acknowledged by the trial court (*E.g.*, 171-2 to 13; A175-6; A178-2 to 5; A179-1 to 14).

petrate a fraud on the court in an attempt to obtain a deliberately false verdict. It was noted that for a defense counsel to abet such a fraud would constitute an ethical violation (A165). See *United States* v. *Grayson, supra*, 98 S.Ct. at 2618. It was also stressed that the ultimate purpose of a trial is the ascertainment of the truth and that an accused does not have the right to commit perjury on the stand. *Id.* The deputy attorney general concluded that the truth should prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination (A179). It is submitted that this contention was a correct extension of the Court's holding in *Hass*, *Harris* and *Walder*. See Comment, "The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of *Kastigar*," 19 Villanova Law Review 470, 481-485 (1974); Comment, "Impeachment, Use Immunity and the Perjurious Defendant, 77 Dickinson L.R. 23 (1972).

A defendant who takes the stand on his own behalf at trial waives his privilege against self-incrimination guaranteed by the Fifth Amendment. *E.g.*, *Doyle* v. *Ohio*, 426 U.S. 610 (1976) (Stevens, J., dissenting at 633); *McGautha* v. *United States*, 402 U.S. 183, 216 (1971); *Harrison* v. *United States*, 392 U.S. 219 (1968); *Brown* v. *United States*, 356 U.S. 148, 155-156 (1958); *Raffel* v. *United States*, 271 U.S. 494 (1926). This waiver is total (*Raffel, supra*) since any voluntary disclosure by the accused is likely to distort the probative picture. The defendant "has the choice, after weighing the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute." *Brown* v. *United States*, *supra* at 155-156. The Court in *Brown* concluded,

> It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. '[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.' *Walder* v. *United States*, 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503. The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination. (*Id.* at 156).

Petitioner submits that the only effective sanction for a defendant's perjury under these circumstances is confrontation with his prior inconsistent statements. As noted in *Brown*:

> Striking the witness' testimony, or relying on the trier of fact to take into account the obvious unfairness of allowing the witness to escape cross-examination, must often in practice be poor substitutes for a positive showing under searching cross-examination that the testimony is in fact false. (*Id.* at 156 n.5)

Often a perjury prosecution by itself will not be an effective sanction; the prosecuting attorney should be permitted to conduct a probing, prying and pressing form of inquiry to expose falsehood and evasion to the jury and "to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." *Bronston* v. *United States*, 409 U.S. 352, 359-360 (1973).

The State believes that apposite analogy may be made to *Oregon* v. *Hass*, 402 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971) and *Walder* v. *United States*, 347 U.S. 62 (1954). In *Harris* the defendant had been interrogated by the police who had failed to advise her of the right to appointed counsel in accordance with *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The prosecution made no effort in its case-in-chief to use the statement, but after defendant testified in her own behalf, used it to impeach her. The Court held that evidence inadmissible against an accused in the prosecution's case-in-chief is not barred for all purposes, provided that it is trustworthy. It reasoned,

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. (citations omitted). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devises of the adversary process. • • •
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. (401 U.S. at 226-227).

It does no violence to the privilege that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence which is damaging to his case. *McGautha* v. *California*, *supra*, 402 U.S. at 214. The immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury. *Glickstein* v.

United States, 222 U.S. 139, 142 (1911); see also *United States* v. *Bryan,* 339 U.S. 323, 340-341 (1950). Similarly, a grant of immunity does not protect a witness from personal disgrace or opprobrium resulting from his compelled testimony exposing his criminal behavior. *Brown* v. *Walker,* 161 U.S. 591 (1896). The purpose of the constitutional privilege against self-incrimination is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. *Id.;* see *Ullmann* v. *United States,* 350 U.S. 422 (1956); *Reina* v. *United States,* 364 U.S. 507 (1960); *Smith* v. *United States,* 337 U.S. 137 (1949); *Interstate Commerce Com.* v. *Baird,* 194 U.S. 25 (1904). It is submitted that the State should be permitted to utilize statements given after the grant of immunity, not for the purpose of proving the accused's guilt, but solely for impeachment purposes at the trial of the substantive crime.

In a comparable situation the defendant in *People* v. *Coleman,* 13 Cal.3d 867, 120 Cal.Rptr. 384, 533 P.2d 1024 (Sup. Ct. 1975) appealed from an order revoking probation, contending that the revocation of his probation in advance of trial on independent criminal charges denied him procedural due process because he was forced to forego his opportunity to testify in his own behalf at his revocation hearing in order to avoid incriminating himself at his pending trial. Recognizing possible tensions between constitutional rights, the California court invoked its supervisory power. It ruled that "upon timely objection the testimony of a probationer at a probation revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his probation, and any evidence derived from such testimony, is inadmissible against the probationer during subsequent proceedings on the related criminal charges.

However, permitted use of such immunized testimony for purposes of impeachment or rebuttal where the probationer's revocation hearing testimony or evidence derived therefrom and his testimony on direct examination are so clearly inconsistent as to warrant the trial court's admission of the revocation hearing testimony or its fruits in order to reveal to the trier of fact the probability that the probationer has committed perjury at either the trial or the revocation hearing." (120 Cal.Rptr. at 402). The California court explained that no purpose would be served by precluding use of that testimony or its fruits to impeach or rebut clearly inconsistent testimony which the probationer volunteers at his trial:

> The intent of our exclusionary rule regarding probation revocation hearing testimony is to encourage the fullest possible truthful disclosure of relevant facts and circumstances at the revocation hearing by allowing a probationer who does testify at his revocation hearing nonetheless to enjoy unimpaired the full protection of the privilege against self-incrimination at his subsequent trial. This privilege requires the prosecution to prove a defendant's guilt through evidence accumulated through its investigative efforts and not extorted from the defendant himself. While the privilege against self-incrimination does assure an accused of the right to remain silent at his trial, it does not—at least under modern principals of Anglo-Saxon jurisprudence (*cf. United States* v. *Grunewald* (2d Cir. 1956) 233 F.2d 556, 587-592 (appendix to dissenting opinion of Frank, J.), revd. (1957) 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed. 2d 931)—encompass a right of an accused to lie in his own behalf at trial. (See *People* v. *Barnes,* (1966) 240 Cal.App.2d 428, 430-433, 49 Cal.Rptr. 470). [120 Cal. Rptr. at 404].

Cf. United States v. *Kahan,* 415 U.S. 239 (1974).

In *Kastigar* this Court stated that "[t]he statutory [immunity] proscription is analogous to the Fifth Amendment requirement in cases of coerced confessions." (406 U.S. at 462). Statements made by a defendant in circumstances violating the strictures of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), are admissible for impeachment purposes if their "trustworthiness . . . satisfies legal standards. *Mincey* v. *Arizona*, —— U.S. ——, 98 S.Ct. 2408, 2416 (1978); *Oregon* v. *Hass, supra*, 420 U.S. at 224; *Harris* v. *New York, supra*, 401 U.S. at 224. While *Mincey* reiterated that any trial use of an *involuntary* confession is a denial of due process of law, it was alluding to the well settled holding that the Fourteenth Amendment forbids the use of involuntary confessions because of (1) the probable unreliability of confessions that are obtained in a manner deemed coercive; (2) the insistence upon putting the government to the task of proving guilt by means other than infringement of an individual's freedom of will by wringing a confession out of him; (3) "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Blackburn* v. *Alabama*, 361 U.S. 199, 206-207 (1960); see *Jackson* v. *Denno*, 378 U.S. 368, 385-386 (1964); *Spano* v. *New York*, 360 U.S. 315, 320-321 (1959). As one commentator has explained:

> The rationale of *Harris* arguably applies to a defendant threatened with impeachment on the basis of prior statements compelled under a grant of 'use/derivative use' immunity. Clearly, such a defendant has no more right than the defendant in *Harris* to commit perjury at his trial. Although he is compelled to testify, as is the individual from whom a confession is involuntarily extracted, his testimony is not subject to the same degree of doubt as to its reliability since it is given under oath. Nor is the deterrence rationale appropos, for there can be no deterrence of illegality nonexistent in the first instance. Exclusion under the immunity grant is in essence a constitutionally mandated recognition by the state that, upon the grant of immunity, it will not unlawfully employ the incriminating testimony elicited to establish its criminal case against a witness. Comment, "The Fifth Amendment And Compelled Testimony: Practical Problems in the Wake of *Kastigar*," 19 Villanova L.R. 470, 483 (1974).

Petitioner submits that unlike a coerced confession, an accused's statement given under the grant of immunity is expected to be truthful, for the reasons to falsify have presumably been removed. If he lies under oath the accused will not be entitled to the benefits of immunity but will be subject to prosecution for perjury, false swearing or contempt. The State did not utilize abhorrent methods to wring a confession from the accused but at all times acted within the confines of the law. Moreover, the State had no intention of utilizing a coerced statement to prove its case. It simply urged permission to utilize the statements given after the grant of immunity solely for impeachment purposes if respondent deliberately attempted to obtain a false verdict by perjuring himself on the stand. None of the policy reasons behind the broad informal use immunity provided for coerced confessions by *Blackburn-Jackson-Miranda* require exclusion in this situation. See generally, Friendly, "The Fifth Amendment Tomorrow: The Case for Constitutional Change," 37 Univ. Cinn. L.R. 671, 679-698 (1968).

It is noteworthy that the statutory immunity grant in this case applied expressly to Mr. Portash's testimony

on November 14, 1974 before the State Grand Jury. The statute (N.J.S.A. 2A:81-17.2a2) by its very terms applies solely to testimony before "any court, grand jury or the State Commission of Investigation." When Mr. Portash was advised that he was being afforded immunity, the deputy attorney general stated:

> We have agreed that the testimony that Mr. Portash *is about to give before the Grand Jury,* under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury.
>
> No representations have been made insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury—a separate Grand Jury from the one Mr. Portash is about to appear before. (A30) (emphasis added).

The substance of respondent's immunized State Grand Jury testimony was restricted for the most part to admission that the documents he had submitted under subpoena had been fabricated by him after the State Police commenced the investigation in 1972 (A34-1 to 43-1). Approximately two weeks after Mr. Portash's grand jury testimony, "charge bargaining" discussions were initiated to avoid the necessity of his indictment. (See A100). As a condition of holding off on his indictment, a statement was taken from respondent on February 5, 1975, in anticipation of his cooperation in Mr. Schmertz's trial, which was a prerequisite of the charge bargaining negotiations (A85 and 86; A90). There is no indication in the statement that it was given pursuant to statutory immunity. (See A58 to 76). Rather, the record merely reflects that the statement was voluntarily given by respondent in connection with the charge bargaining negotiations. It appears that there may have been an understanding that it would not be used by the State at trial in any substantive way.

In the February 5 statement Mr. Portash made more damaging admissions in addition to his grand jury testimony. These admissions in the later statement, in the State's view, may have been the underlying reason for respondent's motions before and at trial. The State in its case-in-chief had introduced independent evidence of the fabricated documents, which was the central focus of defendant's immunized State Grand Jury testimony. It would have been futile and unlikely for respondent to recant that testimony at trial, and it was not realistically anticipated by the State. Rather, respondent reveals one possible reason for his motions in both his Appellate Division brief (at p. IV) and his Brief in Opposition to Petition for Certiorari (at p. 6) where he states that "Had Mr. Portash been able to testify, he would have indicated that he had no knowledge of any connection between Leisure Technology and the Madison Agency at the time of his employment and indeed, *never* learned of the fact that Schmertz was an equal but silent partner during his employment" (emphasis added). In his statement of February 5, 1975, however, Mr. Portash admitted that he had first learned that Schmertz had an interest in Madison Agency about two weeks after he accepted the offer of employment (A59). Considering Mr. Portash's contact with Schmertz prior to that time, *e.g.* on municipal matters and on the bank board, even this latter admission may have understated his knowledge. The court could reasonably have concluded, however, that the testimony at trial was not inconsistent. This underscores the speculative nature of the requested ruling.

The statement of February 5, 1975 was the result of Mr. Portash's rational intellect and free will. He voluntarily entered into the charge bargaining negotiations as an intelligent choice between the alternatives then available to him. It was likewise a product of his free will that he withdrew his offer to cooperate at a later date and chose to defend against the charges. Applying the standards suggested in *Mincey* v. *Arizona, supra,* the statement of February 5, 1975 was not coerced with the threat of a contempt prosecution, its trustworthiness satisfied legal standards, and the statement was obtained in a legal manner. Accordingly, it is submitted that while inadmissible on the State's direct case, the statement should be admissible to impeach respondent's intended trial perjury. Use of the statement given pursuant to charge bargaining negotiations is quite distinguishable from the detrimental consequences of introducing a withdrawn guilty plea at trial. Compare *People* v. *Cole,* —— P.2d ——, 23 Cr.L. Reptr. 2355 (Supreme Court of Colorado, June 5, 1978) with *Kercheval* v. *United States,* 274 U.S. 220 (1927); *State* v. *Boone,* 66 N.J. 38, 327 A.2d 661 (1974); Fed. Rule Crim. Proc. 11(e)(6); Anno: "Propriety and Prejudicial Effect of Showing, In Criminal Case, Withdrawn Guilty Plea," 86 A.L.R.2d 326 (1962). For example, use of the charge bargaining statement would not be inconsistent with the privilege to seek withdrawal and annulment of a plea for all purposes, the statement would not have the conclusive effect of a guilty plea which would induce the jury to become reckless in its consideration of other evidence, and the statement should be regarded as inherently more trustworthy than a guilty plea which may have been prompted for reasons other than guilt. See, *e.g., Brady* v. *United States,* 397 U.S. 742 (1970).

It is evident that when respondent attempted to obtain an anticipatory evidentiary ruling from the trial court, it was faced with very difficult questions involving a number of statements, only one of which was given under a technical grant of statutory immunity. Since respondent had not yet testified, the court was faced with a myriad of abstract and hypothetical issues which cannot be properly decided in a vacuum. The record demonstrates that the court was cognizant of the appropriate standards and in all probability would have rendered the correct decision when the issue became ripe. In the meantime it correctly deferred its ruling and stated that it would handle the matter after respondent's direct testimony, out of the presence of the jury, and on a question-by-question basis. Petitioner advocates that it was permissible to utilize the immunized testimony if respondent had testified in an inconsistent fashion. However, even if petitioner was limited to utilizing false immunized testimony, a hearing on its admissibility did not have to be held until respondent took the stand on his own behalf. To mandate any other procedure would convert the shield of the privilege against self-incrimination which protects the liberty of individual citizens into a sword to destroy the integrity of the judicial system.

CONCLUSION

For these reasons, petitioner urges this Court to reverse the judgment of the Superior Court of New Jersey, Appellate Division and remand for reinstatement of the judgment of conviction and sentence.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1978

No. 77-1489

STATE OF NEW JERSEY,

Petitioner,

vs.

JOSEPH S. PORTASH,

Respondent.

BRIEF FOR RESPONDENT

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Supreme Court of the United States

October Term, 1978

No. 77-1489

STATE OF NEW JERSEY,

Petitioner,

vs.

JOSEPH S. PORTASH,

Respondent.

BRIEF FOR RESPONDENT

JURISDICTION

The respondent, Joseph Portash, respectfully submits that the New Jersey Appellate Courts have properly interpreted the New Jersey State Public Employees Immunity Statute and therefore, adequate State grounds exist for the United States Supreme Court to refuse petitioner's request to exercise jurisdiction in this matter. In *Henry v. Mississippi*, 379 U.S. 443 (1965) Justice Brennan stated on behalf of the Court:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments

which rest on independent and adequate state grounds, even where these judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, *Murdock v. City of Memphis*, 20 Wall. 590, 22 L. Ed. 429 (1875), but also in cases involving state procedural grounds . . . but it is important to distinguish between state substantive grounds and state procedural grounds. Where the ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand. Under the view taken in *Murdock* of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law. Thus, the adequate non federal ground doctrine is necessary to avoid advisory opinions."

QUESTIONS PRESENTED

I. Respondent's conviction was a result of the trial court's ruling which denied the defendant protection of the Fifth Amendment and the State statutes — that conviction was properly reversed.

II. Immunized testimony given before a State Grand Jury pursuant to New Jersey Statutes Annotated 2A:81-17.2a2 cannot be used for impeachment purposes against the defendant in a subsequent criminal trial.

STATEMENT OF THE CASE

Joseph S. Portash, respondent herein, worked in New Jersey as an Assistant Ocean County Planner in 1960. Thereafter, he was appointed and later elected as a member of the Manchester Township Committee, the governing body of

that Ocean County municipality. Prior to this time, the concept of a senior citizens development had begun in neighboring communities. In 1964, as Mayor of Manchester, respondent promoted the concept of Senior Citizen Family Developments. Similarly, he developed a unique real estate analysis method used in selecting a site for the Ocean County College. In 1969, he began informal work for the Madison Agency, a real estate and insurance agency in Lakewood, Ocean County, New Jersey. A few months after that relationship began, respondent was appointed, and subsequently elected, to the Board of Freeholders, the county governing body, at which time respondent left his position as Ocean County Planner.

Eventually, in 1971, Joseph Portash became a formal employee of the Madison Agency and began receiving a salary. At that time, he received a promise of $5,000 for past services and $10,000 advance on future services. Work for the Madison Agency consisted of site analysis on the development of real estate projects in Ocean County, outside Manchester Township. Conferences were held with Donald Safran, the owner of the Madison Agency. During this period of time and while acting as Mayor of Manchester Township, as a member of the Municipal Utilities Authority (to which he was appointed in 1970) and as Freeholder Director, respondent voted on several items involving Leisure Technology Corp., which was doing business in Manchester Township. Many of these votes hindered projects begun by Leisure Technology and imposed costly requirements upon Leisure Technology which other municipalities had not required. See the testimony of Justin Segal (Vol. IX-T3-11). Many of the foregoing facts were not presented to the jury because the trial court's ruling precluded the defendant from taking the witness stand in his own behalf (see Point II, *infra*).

For a considerable amount of time prior to 1970, the Madison Agency had been servicing Leisure Technology with various forms of insurance coverage. Indeed, the Madison Agency received checks periodically from Leisure Technology

representing payment of premiums on such insurance and numerous loans which Robert Schmertz, President of Leisure Technology Corp. made to Donald Safran, President of the Madison Agency (Prisco's testimony, V-T170-172).

Prior to the creation of the Municipal Utilities Authority, Manchester Township had given water and sewer franchises to other senior citizen developments including Crestwood Village (water and sewer franchise) and Cedar Glen Lakes (water franchise). In order to induce Leisure Technology to develop in Manchester Township, the municipal body in early 1970 unanimously agreed to award Leisure Technology a franchise for sewer and water (see Kagan testimony, VII-T111-122). On July 1, 1971, respondent was formally hired by the Madison Agency to do site analysis and render consultation services as a Professional Planner. Had respondent not been denied his constitutional right to testify, he would have indicated that he had no knowledge of any connection between Leisure Technology and the Madison Agency at the time of employment. Indeed, during respondent's employment he never learned of the fact that Schmertz was an equal but silent partner in the Madison Agency. Portash's salary during that time period was a net of $241.20 per week, paid to him by check in the ordinary course of Madison's business (see Prisco testimony, V-T77-79).

During this same period of time, applications concerning Leisure Technology as well as other developers were considered by the Ocean County Planning Board. Several times respondent was absent during the voting on these matters (see Buckwald's testimony, XI-T29-33). There were instances wherein a vote was taken involving matters in which the respondent knew he had a conflict of interest. Some of these matters involved the First State Bank, a bank in which the respondent was a director. In all of these matters, the respondent abstained.

On September 23, 1971, the Madison Agency received a $15,000 check from Leisure Technology. Thereafter, $15,000

went from the Madison Agency to the Insurance Company of North America. The route of the check from Leisure Technology to the Madison Agency and subsequently to the Insurance Company of North America was explained in detail by the bookkeeper of the Madison Agency, Mrs. Prisco, who also explained generally the accounts and their activities (entire Vol. V of transcript). The tracing of the $15,000 check through the non-payroll account No. 103 is particularly stated at (V-T170-3 to 172-4) wherein the witness testified that the check came from Leisure Technology to the Madison Agency on September 23, 1971 and on the next day the check in the amount of $15,000 was made payable from the same account to the Insurance Company of North America, in payment for Leisure Technology insurance premiums. The Attorney General argued that the payment was for respondent notwithstanding the unrebutted proof that the $15,000 was paid to the Insurance Company of North America.

The instant case was tried for 16 days during which time numerous witnesses testified for the State and the defense. The jury thereafter deliberated approximately 17 hours over two days and for 12 consecutive hours on February 11, 1976, the date on which it reached its verdict. The jury found the defendant not guilty of misconduct in office, but guilty of wrongful taking.

The court, in ruling that the State could use the defendant's prior immunized testimony to impeach the respondent on the witness stand, placed him in a position where he was unable to testify in his own defense. Therefore, additional defense testimony was denied admission into evidence by the trial court's ruling that such testimony could not be linked up without the respondent's testimony. (See proffered testimony of Senator Hiering and John Sweeney, X-T19-43.)

Respondent specifically takes exception to the following points of petitioner's Statement of Facts:

Respondent is alleged by the petitioner to have been a self-appointed member of the Manchester Township Municipal Utilities Authority (PB3). Respondent was not self-appointed, but was appointed by the municipal governing body. Petitioner alleges that respondent had a "no show" job (PB4). In fact, this is not the case, respondent was employed and worked out of the office on various field projects for Madison Agency. Further, petitioner alleges that the employment was a conduit for illegal payments. This was not the case, and no evidence was placed in the record with regard to this allegation.

The allegations are a bald attempt to discredit the respondent as a dishonest person. Respondent acknowledged, in his immunized testimony, that certain of the documents evidencing his work and substantiating same were reproduced after the Grand Jury investigation (Appendix, p. 72). Respondent there stated that he reconstructed work records of jobs that were done previously thereto. Petitioner attempts to color the argument by inserting the word "fabricated", in place of reconstructed in order to brand the respondent (PB8).

The State attempts to present a rationale for granting immunity to the respondent by stating that his cooperation in the investigation of the Pineland's Environmental Council and Meridian Engineering was deemed more significant in its impact than in the instant case, *i.e., State v. Robert Schmertz and Leisure Technology*. This is pure conjecture and, in fact, no evidence was ever produced to indicate any significance whatsoever of respondent's testimony regarding the Pineland's Environmental Council.

The petitioner attempts to carve out from the grant of immunity respondent's statement of February 5, 1975, given upon request of the petitioner after its review of his Grand Jury testimony given some two months prior under the grant of immunity (PB9). The statement was conceded by the petitioner at trial to be given pursuant to the grant of immunity as it was evidence derived directly therefrom (Appendix, pp. 120A, 121A).

The statement of February 5, 1975 being derived directly from the prior immunized testimony is subject to the same constitutional and statutory mandate that it not be used against the defendant in any subsequent criminal proceeding as the immunized Grand Jury testimony itself. Notwithstanding their concessions, the petitioner now attempts to allege that the February 5th statement may be used against the defendant in the subsequent criminal proceeding.

At page PB11 the petitioner boldly indicates that it negotiated with respondent in attempting to obtain his removal from public office and in its investigation of him. Their offer either would permit respondent to make a lesser payment of restitution for salaries obtained, *i.e.*, some $15,000, if respondent would also give up his position as executive director of the Pineland's Environmental Council in New Jersey, or the State would stand on its original offer to accept $24, 322 along with respondent's resignation from his position as Mayor and cooperate with the State on other matters.

The petitioner then cavalierly states that the alternative proposal was offered in light of information received during preliminary discussions with respondent which would justify his resignation from the Pineland's Environmental Council, another position of public trust. The statements of respondent totally refute petitioner's allegations. These statements, which are in the record, address themselves only peripherally to any aspect of the Pineland's Environmental Council and nowhere indicate any information which would justify respondent's resignation. Petitioner's attempts to justify the negotiation of settlement monies for the removal of respondent from certain public offices were improper and demeaning to the State Attorney General's office and all law enforcement agencies in the State of New Jersey.

Petitioner attempts to convince this Court that it had in its possession certain information which justified the removal of a

public official from a position of public trust and that it decided not to press for the removal of said official if it could obtain more money from the public official by requiring a higher settlement payment, *i.e.*, $24,322 instead of $15,000. The petitioner's contention is preposterous and is a transparent attempt to justify its negotiations and actual haggling with the respondent over a money judgment and resignation from certain public positions in return for non-indictment in a criminal case. Petitioner embarked on a course of removing respondent from public office at any cost, and the attempted unconstitutional use of immunized testimony was the final step in the petitioner's design.

Petitioner indicates that the Deputy Attorney General spoke to the respondent on several occasions and contends that they were reluctant to do so (PB11). However, they reluctantly acceded to the extraordinary request of prior defense counsel in this instance and thereafter on one occasion spoke on the telephone directly with respondent for over an hour. In the conversation, respondent indicated that he was troubled about making the right decision, asserting that he had done nothing wrong and that to return the wages earned from his employment and to resign would be too much for him to bear. Other conversations took place between the respondent and the Deputy Attorney General assigned to the case. The respondent contends that he was advised by a Deputy Attorney General that he would have to alter his testimony in order to "get Schmertz" (XIII-T29).

Petitioner's conduct throughout the course of this proceeding is replete with coercion of the respondent; promises, proposals, negotiations, all of which had the central aim of removing the respondent from public office. When all of these methods employed by petitioner failed because respondent refused to step down from public office, petitioner obtained an indictment and conviction by improperly threatening the use of immunized testimony in the subsequent criminal proceeding.

The New Jersey Appellate Court determined that the attempted use of such testimony was in violation of the State Public Employees Immunity Statute and the Fifth Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

I. Trial court erred in ruling that respondent's prior immunized Grand Jury testimony could be utilized to impeach him in a subsequent criminal procedure. This ruling was in violation of the Public Employees Immunity Statute and the Appellate Division of the New Jersey Superior Court properly reversed respondent's conviction. The Court's interpretation of the New Jersey statute was correct and the New Jersey Supreme Court refused to grant the State's petition for certification notwithstanding the State's argument that a waiver of defendant's rights had occurred. In fact, a ruling was sought at the trial court and given (XII-T60-20 to 61-20). New Jersey's Appellate and Supreme Court refused totally petitioner's erroneous argument that no ruling was given by the trial court. The case of *Brooks v. Tennessee*, 406 U.S. 605 (1972) and *Wardius v. Oregon*, 412 U.S. 470 (1973), support defendant's contention that he has not waived his Fifth Amendment privilege in the instant matter. In fact, had defendant taken the stand, he would have been deemed under existing law to have waived his privilege against self-incrimination. Petitioner's argument is totally specious and is unsupported by either New Jersey or United States Supreme Court authority. The "price" which the petitioner extracted from the respondent by threatening him with an unconstitutional use of his testimony was to prevent respondent from taking the stand. The coercive effect of extracting from respondent this unconstitutional "price" must not be permitted to succeed.

II. Respondent was compelled to surrender his Fifth Amendment privileges by the Public Employees Immunity Statute of the State of New Jersey which requires a public employee to testify at the Grand Jury or face forfeiture of his

position. After, respondent testified and after the petitioner took other statements from the respondent which were directly the result of his Grand Jury testimony, the defendant was indicted for misconduct in office and taking monies by a public employee. At trial, the petitioner threatened that if the defendant attempted to take the stand in his own defense, they would use the immunized Grand Jury testimony previously given to impeach his credibility if he was inconsistent in any manner. Defendant sought a court ruling that the New Jersey Public Employees statutory language which forbids the use in any subsequent criminal proceeding would bar the State from using the immunized testimony in the manner sought. The trial court ruled that the immunized testimony could be used to impeach defendant's credibility and the defendant, on the basis of the court's ruling, refused to testify.

The language of the statute is clear that no use can be made of the immunized testimony in a subsequent criminal proceeding except one for prosecution of perjury or false swearing which, of course, is not applicable here. As stated in *Kastigar v. United States,* 406 U.S. 441 (1972), in order to pass constitutional muster any use of the immunized testimony at a subsequent criminal proceeding is prohibited. The New Jersey Appellate Division relied on *Kastigar, supra,* and on the explicit language in the statute and reversed respondent's conviction on the basis that the trial court's ruling permitting the use of the testimony for impeachment purposes was improper as in violation of both the State statute and the United States Constitution's Fifth Amendment. The New Jersey Supreme Court dismissed the petitioner's subsequent appeal and they petitioned for a writ of certification. The New Jersey Court's interpretation of their statute was proper and is supported by numerous cases cited in respondent's Point II which held that an attempted use to impeach the credibility of a defendant through the use of immunized testimony is improper and unconstitutional. Petitioner's argument that a subsequent statement given by the respondent on February 5, 1975 is not subject to statutory immunity is specious in that it was directly derived from the

immunized Grand Jury testimony and under *Kastigar v. United States, supra,* is subject to the same prohibitions against use as the immunized testimony itself. In fact, this point was conceded at trial and was raised for the first time on appeal notwithstanding the concession by the petitioner at trial. Petitioner's reliance upon *Harris v. New York,* 401 U.S. 222 (1971) to allow the testimony is inappropriate as stated in *United States v. Hockenberry,* 474 F.2d 274 (3rd Cir. 1973); *United States v. Frumento,* 552 F.2d 534 (3rd Cir. 1977) and *United States v. Apfelbaum,* ____ F.2d ____ (3rd Cir. 1978). Respondent further urges that adequate State grounds exist because of the New Jersey Appellate Court's interpretation of their own statute which is a matter of domestic substantive law. Respondent urges that the Court should refuse to exercise jurisdiction on the basis of the adequate State grounds and deny petitioner's request for the Court to take jurisdiction. If the Court wishes to reach the question of the use of the immunized testimony, respondent urges that *Hockenberry, Frumento, Apfelbaum* as well as the Appellate Division of *State v. Portash,* are well reasoned, logical and compelling in their holdings that the use of the testimony in the manner urged by petitioner would unconstitutionally dilute respondent's Fifth Amendment constitutional privileges.

ARGUMENT

Point I

Respondent's conviction was a result of the trial court's ruling which denied the defendant protection of the Fifth Amendment and the State statutues. That conviction was properly reversed.

The petitioner's argument would have the Court believe that the trial court reached no decision regarding the use of the respondent's immunized testimony and that the respondent waived any constitutional protection by failing to take the stand. This argument is erroneous based upon the facts and the law

applied to those facts, the State law, and general federal concepts of waiver.

Notwithstanding the petitioner's assertion, the court below did in fact rule that the defendant's immunized testimony could be used against him in cross-examination in the following clear unequivocal language:

> "THE COURT: Well, this is what the Court was concerned with and still is and I thought the Court had straightened it out previously, the witness taking the stand and testifying as to something and then have counsel saying didn't you say before the grand jury such and such.
>
> MR. WILBERT: That's the problem that we have. We don't know whether he's going to be able to use that or not, your Honor, especially if he didn't touch that area in his examination.
>
> THE COURT: Mr. Wilbert, suppose your client takes the stand and he testifies that I worked for Donald Safran and suppose he testified before the grand jury I never worked for Donald Safran?
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> MR. WILBERT: Inconsistency and under your Honor's ruling that can be used in this case.
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> THE COURT: *No doubt about it.*
>
> MR. WILBERT: Your Honor, I would submit it could be used over my objection, of course.
>
> THE COURT: You have a standing objection with respect to the use at all of the grand jury testimony." (XII-T60-20 to 61-20). (Emphasis added.)

It is obvious from the language quoted that there is no question that the trial court did in fact rule under the New Jersey Public Employees Immunity Statute and consistent with the Fifth Amendment constitutional privileges that prior, immunized Grand Jury testimony could be used to impeach the respondent. Faced with the court's ruling the respondent properly invoked his Fifth Amendment privilege and his privileges under the New Jersey Public Employees Immunity Statute and refused to testify.

Petitioner argues that respondent waived his constitutional privilege by not testifying and the potential Fifth Amendment problem did not ripen into an acutal injury. This argument is fundamentally misconceived, because it ignores the fact that defendant paid a "price" to prevent the trial court from acting on its threat to violate his privilege against self-incrimination. We must assume for purposes of the petitioner's waiver argument that use of the defendant's testimony would have violated his privilege against self-incrimination. Accordingly, in the instant case, the petitioner used threats of unconstitutional conduct to obtain something from the respondent that it was not otherwise entitled to, *i.e.*, his decision not to testify as a witness in his defense. In order to prevent the State from committing a wrongful violation of his privilege against self-incrimination, the respondent was forced to give up something that he was otherwise entitled to, namely, his right to testify on his own behalf and thereby suffered constitutional injury.

This point can best be illustrated by example. Suppose that instead of threatening to use his testimony for purposes of impeachment, the petitioner had threatened to use the compelled testimony unless the defendant agreed to waive his right to counsel, or right to jury trial, or to pay the prosecutor $1,000 under the table. Surely, if the defendant did one of those things in order to forestall the prosecutor from violating his privilege against self-incrimination, he could demonstrate that he had been wrongfully compelled to pay a "price" to protect his privilege. Otherwise, if the waiver argument is accepted, it

dictates that the State can get away with threatening the defendant with unconstitutional conduct, so long as the threat is intimidating enough to be successful.

The United States Supreme Court in *Brooks v. Tennessee,* 406 U.S. 605 (1972) had occasion to consider whether the State could exact a "price" from defendant in return for allowing him to testify in his own defense. The Supreme Court in review of such matter declared that the defendant did not waive his constitutional right to be silent. The Tennessee State statute in *Brooks* required that if the defendant testify in his own defense, he testify as the first defense witness or not at all. The Supreme Court declared that statute to be unconstitutional and reasoned at page 610:

> "Section 40-2043 (the statute in the Brooks case) exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first. This, we think, casts a heavy burden on the defendant's otherwise unconditional right not to take the stand. The rule, in other words, 'cuts down on the privilege (to remain silent) by making its assertion costly'." *Griffin v. California,* 380 U.S. 609 (1965).

The "price" in the instant case is more onerous than *Brooks* because respondent gave up his absolute right to remain silent under compulsion of the New Jersey Public Employees Immunity Statute. Under the precise terms of the statute, respondent surrendered his Fifth Amendment right on the basis that the immunized testimony would not be used against him in any subsequent criminal proceeding. The trial court's ruling that the immunized testimony could be used to impeach his credibility, if he chose to take the stand and testify in his own defense, unconstitutionally infringed his Fifth Amendment privilege.

It is abundantly clear from a reading in *Brooks* that the defendant did not waive his constitutional rights. Such rationale should be applied in the instant matter to preserve the respondent's Fifth Amendment protection. Further support for respondent's protection is found in *Wardius v. Oregon,* 412 U.S. 470 (1973).

In *Wardius, supra,* Justice Marshall reviewed a due process argument of defendant regarding his requirement to provide an alibi defense in advance of trial when there was no reciprocal requirement on the part of the State to provide discovery. The State contended that defendant had waived his right to argue the constitutionality of the statute by not providing the alibi defense and, in fact, because the State had not introduced rebuttal testimony to disprove the alibi, the defendant suffered no injury. *Wardius, supra,* page 477. Justice Marshall, in response to the State's argument, opined at page 477:

> "At the time petitioner was forced to decide whether or not to reveal his alibi defense to the prosecution, he had to deal with the statute as written with no way of knowing how it might subsequently be interpreted. Nor could he retract the information once provided should it turn out later that the hoped-for reciprocal discovery rights were not granted."

Justice Marshall further stated at page 478:

> "The statute as written did not provide for reciprocal discovery, and Petitioner cannot be faulted for taking the legislature at its word."

In the instant case, of course, the respondent cannot be faulted for taking the Legislature of the State of New Jersey at its word when it stated, in compelling him to surrender his Fifth Amendment privilege, that no use would be made of his testimony in a subsequent criminal proceeding.

In his dissenting opinion in *Brooks, supra,* Chief Justice Berger, voting to uphold the Tennessee statute, stated at page 614:

> "Petitioner was clearly not subjected to the obvious compulsion of being held in contempt for his silence, as in *Malloy v. Hogan,* 378 U.S. 1 (1964), nor did the Tennessee procedure subject him to any other significant compulsion to testify other than the compulsion faced by every defendant who chooses not to take the stand — the knowledge that in the absence of his testimony the force of the State's evidence may lead the jury to convict. Cases such as *Spevack v. Klein,* 385 U.S. 511 (1967) and *Gardner v. Broderick,* 392 U.S. 273 (1968), involving loss of employment or disbarment are therefore clearly inapposite."

In the instant case, of course, the defendant was subjected to the sanctions of the Public Employee Immunity Statute when he chose not to testify at the Grand Jury and was required to waive his Fifth Amendment privilege under the terms of the statute. Chief Justice Berger continued at page 616,

> "The rule that the defendant waives the Fifth Amendment privilege as to any and all relevant matters when he decides to take the stand certainly inhibits the choices and options of counsel, yet this Court has never questioned such a rule and reaffirmed its validity only last Term. See *McGautha v. California,* 402 U.S. 183, 215 (1971).
>
> * * *
>
> This is not a case or an issue of great importance, except as it erodes the important

> policy of allowing diversity of method and procedure to the States to the end that they can experiment and innovate, and retreat if they find they have taken a wrong path. Long ago, Justice Brandeis spoke of the need to let 'a single courageous state' try what others have not tried or will not try."

New Jersey has decided, in unequivocal terms, that the respondent has not waived his privilege in the instant matter and that the procedure he invoked by seeking and obtaining the trial court's ruling as to the use, if any, that the State may make of the prior immunized testimony was the proper manner of asserting his privilege against self-incrimination. Furthermore, the New Jersey courts have interpreted their own State's statute to hold that immunized testimony may not be used to impeach the defendant in a subsequent criminal proceeding.

It cannot be argued that there was a waiver in this case under the general federal concepts. No case cited by the petitioner nor known to the respondent stands for the proposition that the defendant must take the stand in trial to evoke his Fifth Amendment privilege against self-incrimination. Indeed, the contrary rule prevails, that upon taking the stand to offer testimony, the defendant waives his privilege against self-incrimination. *Smith v. United States,* 337 U.S. 137 (1949); *Johnson v. United States,* 318 U.S. 189 (1943). A witness may refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977). The trial court was obligated to render a decision and properly did so to apprise the respondent of the full ramifications of his taking the stand. Indeed, the case law is clear. Had the defendant been willing to forego his rights to the Fifth Amendment privilege and taken the stand, the State would then be in the position to argue that the defendant waived his constitutional immunity from giving testimony against himself by offering himself as a witness. *Raffel v. United States,* 271 U.S. 494 (1926); *Johnson v. United States, supra.*

Under the State's argument, the respondent would be required to take the stand in order to invoke the protection given his immunized testimony under the Fifth Amendment, but would have waived the protection of the Fifth Amendment by taking the stand. Such is the cruel irony that the petitioner would impose upon the respondent.

In the petitioner's argument *Hobson's Choice* reaches its apogee. Respondent's right against self-incrimination entitles him to remain silent unless he chooses to speak in the exercise of his own will and to suffer no penalty for such silence. *Smith v. United States,* 337 U.S. 137 (1949). In the case at bar, respondent's counsel and the State consumed 150 pages of transcript in an attempt to invoke the Fifth Amendment privilege against incrimination and the protection of the immunity statute. No clearer fact can be demonstrated from a reading of the transcript. The respondent refused to take the stand for the very purpose of protecting his Fifth Amendment privilege. Refusing to testify is in itself an assertion of the Fifth Amendment guarantee. That right is never lost unless voluntarily and intelligently waived. *Smith v. United States, supra. See also, Emspak v. United States,* 349 U.S. 190 (1955).

The privilege against self-incrimination must be claimed and may be waived. The witness, however, after having claimed the privilege, cannot properly be held to have waived such privilege and consequent immunity on vague and uncertain evidence inasmuch as waiver of constitutional rights is not to be lightly inferred. In the case at bar, the State now urges that the respondent should be placed in a vague and uncertain atmosphere of not knowing the extent of his protection prior to taking the stand. Indeed, upon taking the stand, the respondent would have waived his right against self-incrimination without full knowledge of the extent of the waiver and the State would then be in a position to argue that the respondent had waived his Fifth Amendment privilege. *See Smith v. United States, supra; Garner v. United States,* 424 U.S. 648 (1976); *Lefkowitz v.*

Turley, 414 U.S. 70 (1973); *see also Garrity v. New Jersey,* 385 U.S. 493 (1967). The respondent followed the only course of conduct available to him in order to protect his Fifth Amendment constitutional privilege after being confronted with the trial court's ruling. The respondent did not waive his constitutional privilege but rather attempted to preserve it in the strongest and clearest terms.

Neither the federal law nor the State law supports the petitioner's contention that the respondent waived his constitutional rights. The State Appellate Division, in the instant matter, acted properly under the United States Constitution and New Jersey State law in reversing respondent's illegal conviction.

Point II

Immunized testimony given before a State Grand Jury, pursuant to New Jersey Statutes Annotated 2A:81-17.2a2 cannot be used for impeachment purposes against the defendant in a subsequent criminal trial.

New Jersey Public Fmployees Immunity Statute, N.J.S.A. 2A:81-17.2a2 provided:

> "If any public employee testifies before any Court, grand jury or the State Commission of Investigation, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury committed while so testifying."

The statute was amended after respondent testified before the Grand Jury and in its present form states:

> "If any public employee, *having claimed the privilege against self-incrimination,* testified before any court, grand jury or the State Commission of Investigation *after having been informed that his failure to appear and testify would subject him to removal from his office,* position or employment, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury or *false swearing* committed while so testifying."

Prior to his indictment on November 6, 1974, respondent appeared with counsel before a State Grand Jury investigating Robert Schmertz, Leisure Technology's President, and Madison Agency principal. Respondent's appearance before the Grand Jury was in response to a subpoena served upon him on October 29, 1974. Respondent expressed his intention of claiming his Fifth Amendment privilege against self-incrimination. Subpoenaed again for November 14, 1974, respondent was granted immunity in the following terms:

> "We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury. No representations have been made insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury, a separate Grand Jury from the one Mr. Portash is about to appear before."

Respondent was asked whether he understood the purport of this agreement.

> "Mr. Luciani: (Deputy Attorney at Grand Jury proceeding and co-counsel at subsequent trial) Mr. Portash, do you understand, have you discussed this matter with your attorney?
>
> Mr. Portash: I believe so.
>
> Mr. Luciani: And you understand the fact that nothing you are about to testify to can be used against you, personally, in any subsequent criminal prosecution?
>
> Mr. Portash: To the best of my knowledge of legal matters, yes."

Respondent then testified before the Grand Jury.

Thereafter, the State, in order to further clarify and augment respondent's Grand Jury testimony, took another statement on February 5, 1975, based on information learned by the State as a result of respondent's prior immunized Grand Jury testimony. Thereafter, at a subsequent trial on the matter, the trial court ruled that the immunized testimony could be used to impeach the respondent if he took the stand in his own defense. Petitioner's action in attempting to use respondent's statements to impeach him deprived respondent of his constitutional protection under the Fifth Amendment. The New Jersey Appellate Division found that the statute in question and the Fifth Amendment prohibited such use by the State and reversed respondent's conviction. The New Jersey Supreme Court denied the State's petition for certification, and dismissed the State's appeal. The New Jersey Appellate Division and Supreme Court determinations were proper under their interpretation of the New Jersey statute and existing case law.

Kastigar v. United States, 406 U.S. 441 (1972) held that immunity from use and derivative use was coextensive with the scope of the Fifth Amendment constitutional privilege against

self-incrimination and was therefore constitutionally sufficient to compel testimony over claim of privilege. In discussing use immunity, Justice Powell speaking for the Court stated as follows:

> "Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U.S. at 453 (emphasis in original).

The Supreme Court's pronouncement in *Kastigar, supra,* indicates that immunized testimony could not be used in any manner to impeach a witness' credibility on cross-examination.

In *United States v. Hockenberry,* 474 F. 2d 247 (3rd Cir. 1973) Judge Hastie discussed the effect of *Kastigar, supra,* on the possible use of immunized testimony in cross-examination. The trial court therein had admitted into evidence against the defendant at a perjury trial a truthful statement which the defendant had made to a Grand Jury on the same occasion as an alleged false statement unrelated to it. The defendant had testified under a grant of use immunity. After the defendant took the stand in his own defense and denied any knowledge of bribes or payoff, the prosecution attempted to discredit him on cross-examination by directing questions about his Grand Jury testimony. Over objection, the prosecution read excerpts from the Grand Jury testimony into the record. On appeal, the court held that the defendant's statements were definitely used against him since the statements were used to impeach his credibility as an accused person testifying in his own defense. In citing the *Kastigar, supra,* decision, the court rejected the prosecution's claim that an immunized statement could be used to discredit an individual as a witness in a subsequent prosecution if the

admission was truthful. The court stated that if immunity that deprives a defendant of the Fifth Amendment privilege is to be, as constitutionally it must, coextensive with the privilege itself, compelled admission of wrongdoing cannot later be used to discredit a defendant's effort to defend himself against a charge of some other wrongdoing. *Hockenberry, supra* at page 250.

Hockenberry holds that use immunity prohibits any use including an attempted impeachment of credibility on cross-examination and is squarely on point.

Further, in *Hockenberry, supra,* Judge Hastie specifically rejected the prosecution's reliance upon *Harris v. New York,* 401 U.S. 222 (1971). The court noted that the *Harris* case was involved with the *Miranda* procedural requirements as to right of counsel and had nothing to do with a matter involving immunity under a statute. Thus, the whole line of reasoning in *Harris* and cases subsequent to it cannot apply in regard to the attempted use of immunized testimony on cross-examination.

The trial court in the instant case (XII-T61-7 to 20) ruled that if respondent testified inconsistently with his Grand Jury testimony it would allow the Deputy Attorney General to cross-examine him using respondent's immunized Grand Jury testimony.

In *United States v. Frumento,* 552 F.2d 534 (3rd Cir. 1977) the United States Court of Appeals for the Third Circuit has occasion to again examine the question of whether immunized Grand Jury testimony could be used to impeach the credibility of defendant at a subsequent criminal proceeding. Therein Judge Garth, writing for the court *en banc,* addressed himself to the contention of defendant (Pisciotta) that he should not be required to testify under a grant of immunity before a trial court on the basis that if he were compelled to testify, the government might attempt to use his immunized testimony for the purpose of impeaching him should defendant testify in his own defense at a subsequent trial. The court therein stated at page 542:

"Here, no one claims that Pisciotta's responses could be used in the government's case in chief against him at a subsequent trial. Clearly, such use would contravene *Kastigar*, and would be exposed in a *Kastigar* hearing. At such a hearing, the burden upon the government to show that its evidence was derived from sources other than the immunized witness's testimony is a heavy one. *Kastigar v. United States*, supra 406 U.S. at 460, 461. (other cites omitted) Pisciotta's fear — a fear which is justified in part in light of the position taken by the government, (citing footnote 15 at bottom of page 542), is that the government could use his immunized testimony for the purpose of impeaching him should he testify in his own defense at a subsequent trial. However, if the government could use 'immunized' testimony in such a fashion, the point would be reached where a witness could, under *Kastigar*, have 'just cause' to refuse to answer. Clearly, if a witness had invoked his Fifth Amendment privilege, the government could have no testimony available with which it might impeach his subsequent sworn statements. Were we to permit impeachment with immunized testimony, we would then be affording the immunized witness something less than his full Fifth Amendment protection.

In *United States v. Hockenberry*, 474 F. 2d 247 (3d Cir. 1973), the government urged this Court to adopt a rule permitting the use of immunized testimony 'for the purpose of impeaching the immunized witness or an immunized defendant when . . . he chooses to testify on his own behalf.' Id. at 249 n.1. We responded that to argue . . . that the immunity statute allows the

use of any truthful admission of wrongdoing made in an immunized statement to discredit the individual as a witness in a subsequent prosecution, so narrows the statutory grant of immunity as to jeopardize its adequacy as a constitutional means of requiring self incrimination. But for the grant of immunity *Hockenberry* would have been privileged to refuse to admit to the grand jury his wrongdoing in the execution of affidavits to obtain search warrants. And if immunity that deprived him of that privilege is to be, as constitutionally it must, co-extensive with the privilege itself, his compelled admission of wrongdoing cannot later be used to discredit his effort to defend himself against a charge of some other wrongdoing. 'Immunity from the use of compelled testimony . . . prohibits the prosecutorial authorities from using the compelled testimony in *any* respect . . .'. Powell, J., in *Kastigar v. United States*, supra, 474 F. 2d at 249-50. We reiterate our adherence to this principle; except as the basis for a prosecution for perjury a witness's immunized testimony may not be used against him.

Finally, we note, as we did in *Hockenberry*, that *Harris v. New York*, 401 U.S. 222 (1971), does not bear upon this discussion. *Harris* held that statements inadmissible in the government's case in chief because of *Miranda* deficiencies could be used to impeach. *Harris* does not govern the use of statements obtained through a grant of immunity. Statements obtained under a grant of immunity are compelled-in essence, coerced. The compulsion, which under other circumstances would amount to a violation of Fifth Amendment rights, is permitted because of the

substitution of use and derivative use immunity. *Harris* offers no such safeguards, and is thus restricted to cases where coercion is not a factor. The *Harris* Court qualified its rule permitting impeachment as follows: 'Petitioner makes no claim that the statements made to the police were coerced or involuntary.' 401 U.S. at 224. We cannot conceive of any instance in which a witness given immunity could not claim that his testimony is both coerced and involuntary. The *Harris* rule, therefore, does not govern the use of such testimony. Pisciotta's dilemma, then, is illusory. His testimony could be used against him only in the event of a prosecution for perjury, but in no other way and for no other reason."

Finally, in the recent decision of *United States v. Apfelbaum*, ____F. 2d ____ (3rd Cir. August 10, 1978), the United States Circuit Court of Appeals for the Third Circuit once again addressed itself to the issue of the use of immunized testimony against the defendant in a subsequent criminal proceeding. The court therein interpreted a federal immunity statute, 18 U.S.C., Section 6002, a statute which is comparable to the New Jersey Immunity Statute at issue in this case. Judge Garth speaking for the court stated, that Grand Jury testimony which is compelled under a grant of immunity may be utilized only as the *corpus delicti of an indictment for perjury or for false swearing.*

Judge Garth said:

> "A grant of 'use and fruits' immunity conferred under 18 U.S.C. Section 6002 may indeed substitute for the Fifth Amendment privilege, but only because its protection against the subsequent use of the compelled testimony is *coextensive* with the scope of the privilege. *Kastigar v. United States,* 406 U.S. at 453. That

> is, the grant of the immunity must, by definition, afford the witness the same protection he would have received had he invoked the privilege. See *Kastigar v. United States,* 406 U.S. at 462; *United States v. Frumento,* 552 F. 2d 534, 542-43 (3d Cir. 1977) (en banc); *United States v. Kurzer,* 534 F. 2d 511, 516 (2d Cir. 1976). Because a witness who has properly invoked the privilege may remain silent, see *Kastigar v. United States,* 406 U.S. at 461, use and fruits immunity under section 6002 'prohibits the prosecutorial authorities from using the compelled testimony in *any* respect.' Id. at 453 . (Emphasis in original); accord, *United States v. Frumento,* 552 F. 2d at 543; *United States v. Hockenberry,* 474 F. 2d 247 (3d Cir. 1973). Put another way, invocation of the privilege would have left Apfelbaum in a position where he would not have answered questions, truthfully or falsely, and thus such answers could not have been used against him. In the words of the Constitution, he would not have been compelled to 'be a witness against himself.' "

In response to the petitioner's claim that there is no remedy for a witness' untruthful testimony, the court continued:

> "The sanction of the perjury statute adequately protects against a witness making a mockery of immunity. Our court has accordingly held that although a witness's false immunized testimony may indeed subject him to a prosecution for perjury, *United States v. Frumento,* 552 F. 2d at 543; *United States v. Hockenberry,* 474 F. 2d at 249, the use of the witness's immunized testimony is limited only to its use as the basis of a perjury indictment."

The court continued:

> "Other than as the *corpus delicti* of the indictment, the Government may not use immunized testimony as substantive evidence. *United States v. Frumento,* 552 F. 2d at 541-43; *United States v. Hockenberry,* 474 F. 2d at 249-50. As we have previously explained: 'no one could claim that the appellant's immunized responses could be used in the government's case in chief against him at a subsequent trial. Clearly such use would contravene *Kastigar.' United States v. Frumento,* 552 F. 2d at 542. Nor may immunized testimony be used to impeach the testimony of the witness. Id. at 542-43; *United States v. Hockenberry,* 474 F. 2d at 250.
>
> Clearly if a witness had invoked his Fifth Amendment privilege, the government could have no testimony available with which it might impeach his subsequent sworn statements. Were we to permit impeachment with immunized testimony, we would then be affording the immunized witness something less than his full Fifth Amendment protection." *United States v. Frumento,* 552 F. 2d at 543.

The court stated further:

> "Rather, *Frumento and Hockenberry* unequivocally prohibit any subsequent use of truthful immunized testimony against its speaker. We of course are bound by this precedent. Even were we not so bound, we would independently reach the same conclusion."

The reasoning in all of these cases is compelling. Were the defendant not compelled under a grant of immunity to testify,

there would, of course, be no statement in existence to impeach his credibility. To allow the State to utilize compelled testimony given under a grant of immunity to impeach the credibility of a defendant dilutes, in an unconstitutional manner, the defendant's Fifth Amendment protection.

The court concluded:

> "As to the Government's assertion that Apfelbaum's grand jury testimony was 'in all likelihood false', we acknowledge that if it is false it is unprotected, and therefore would subject Apfelbaum to the risk of a perjury or a false statement prosecution. However until such time as the immunized statements are incorporated into a false swearing indictment as the *corpus delicti* of the indictment, the statements are unavailable for use by the Government at trial. Permitting the Government unrestricted use of any immunized statements whenever it supposes them to be false would necessarily vitiate the protection afforded by a grant of immunity and would effectively abrogate the immunity agreement. As the Second Circuit Court of Appeals has observed, and as we here hold, the proper remedy in the situation where the Government believes that immunized statements are false is not to disregard the immunity grant but rather is to prosecute the perjurious witness. See *United States v. Kurzer,* 534 F.2d at 518. But cf. *United States v. Traumunti,* 500 F.2d 1334 (2d Cir.), *cert. denied,* 419 U.S. 1079 (1974)."

In the instant case there is no contention on the part of the petitioner that the statements of the respondent given under the grant of immunity are in any way false. In fact, it is conceded that they were truthful statements.

The court in *Apfelbaum* meticulously detailed the state of the law and also the proper remedy available to the State if they contend that the testimony at trial or given under the grant of immunity is false. That remedy is an indictment and prosecution for perjury or false swearing. The same remedy is afforded by the New Jersey statute in question and by the Appellate Division's decision in the instant case. *See also United States v. Kurzer,* 534 F.2d 511, 518 (2d Cir. 1976).

In *State of New Jersey v. Portash,* 151 N.J. Super. 200 (App. Div. 1977), *cert. denied,* 75 N.J. 597 (1978), *cert. granted,* ___ U.S. ___ (1978), the court stated at page 207:

> "the question is whether the State should be required to honor its promise, expressed in its statute and explicated in leading cases defining the required scope of immunity, not to use the testimony compelled in any subsequent criminal proceeding against the defendant, except in circumstances not here pertinent."

The court continued in the footnote at the bottom of page 207 of its opinion "i.e. in a charge for perjury or false swearing in giving the compelled testimony." The Appellate Division further, at page 204, quoted the statute which clearly indicates that no such public employee shall be exempt from prosecution or punishment for perjury or false swearing committed while so testifying.

It was conceded by respondent at trial and again at oral argument in the Appellate Division that in the event he were to testify at trial in an inconsistent manner with the Grand Jury testimony, the State would be afforded the remedy given under the statute. The court stated in its opinion at 207, that an indictment and prosecution for perjury could be brought against the defendant and the Grand Jury testimony could be introduced against the defendant at his trial for perjury. Petitioner's Argument at pages 30 and 31 of its brief misstates the court's opinion in its entirety.

New Jersey is in accord with the *Kastigar, Hockenberry, Frumento, Kurzer* and *Apfelbaum* decisions. *State v. Vinegra,* 134 N.J. Super. 432 (App. Div. 1975), *aff'd,* 73 N.J. 484 (1977) deals with the same statute under discussion in the case now presented before this Court. Judge Crane, speaking for the court, ruled that defendant's testimony before the Grand Jury may not be introduced in evidence against him in any subsequent criminal proceeding except as it might be relevant in a prosecution for perjury or false swearing (at page 439).

The court in *Vinegra, supra,* said: "Since defendant's Fifth Amendment protection is derived from the statute, we need not consider the effect of *Miranda v. Arizona.*" (citations omitted) 134 N.J. Super. at p. 439.

The Deputy Attorney General and the trial court relied heavily on *State v. Miller,* 67 N.J. 229 (1975) and *State v. Davis,* 67 N.J. 222 (1975).

In *Miller, supra,* the court specifically said that a statement which would be admissible on cross-examination under *Harris v. New York,* 401 U.S. 222 (1971) could only be admissible if the jury is clearly told that it may use this statement only in weighing the defendant's credibility and that it could not be used as substantive evidence. It further held that under New Jersey Evidence Rule 4, the court also has the right to exclude a *Harris, supra,* type statement entirely and bar its use even for the limited purpose of impeaching the defendant's credibility as a witness if it concludes that the probative value of the statement is substantially outweighed by the risk that its admission would create a substantial danger of undue prejudice or of misleading the jury. *See Miller, supra,* at p. 234.

State v. Davis, supra, held that the State could not use testimony which might be admissible to impeach a witness' credibility to rebut the testimony of alibi witnesses.

These two decisions turn on different principles than the case at bar. Both *State v. Miller, supra,* and *State v. Davis, supra,* rely on the reasoning of *Harris v. New York, supra,* which held that an arrested person's voluntary incriminating statement, though inadmissible as part of the prosecution's case in chief because the prisoner had not been advised of his right to counsel, may be used to impeach his credibility when he testifies as a witness in his own defense. In *Harris, supra,* the Court was deciding how broad a sanction is necessary to vindicate the *Miranda* procedural requirement that an arrested suspect must be advised of his right to counsel before he shall be interrogated. *United States v. Hockenberry, supra,* at p. 250.

The question at issue in the instant case is the scope of use immunity that government must afford in order to comply with the United States constitutional and New Jersey statutory protections against self-incrimination. The State has undertaken to grant a witness coextensive protection in order to justify compelling him to make an incriminating statement. The mandated *quid pro quo* is immunity coextensive with the privilege, to wit: immunity from any damaging use of the compelled truthful statement in a criminal prosecution. The *Harris* rule does not compel a person to incriminate himself. The abridgement of immunity in this case does. The court's ruling prevented the defendant from taking the witness stand for it subjected the respondent, in the event he took the stand, to an unconstitutional use of immunized testimony.

The State has never alleged that Mr. Portash did not tell the truth while testifying before the State Grand Jury. If it had, the State under the exception to N.J.S.A. 2A:81-17.2a2 could have tried him for perjury, or false swearing.

The State, through the Attorney General's office, made representations pursuant to the statute that the immunized testimony "Shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State . . ." N.J.S.A. 2A:81-17.2a2.

However, after making these representations, the State with the ruling of the trial court, now says that it can do what it promised not to do.

The Appellate Division's decision in this case held that the petitioner should not be permitted to impeach respondent's credibility at trial by use of testimony given under a grant of immunity pursuant to State statute. The State court's decision was proper. It is respectfully submitted there is no reason for the United State Supreme Court to review the New Jersey court's interpretation of this New Jersey statute. If the Court deems it advisable to review the New Jersey court's decision as not having been decided on adequate State grounds, the Supreme Court should uphold the decision below as being a proper interpretation of the Fifth Amendment requirements of the Public Employees Immunity Statute.

CONCLUSION

For all of the foregoing reasons, respondent urges this Court to affirm the judgment of the Superior Court of the New Jersey Appellate Division and the denial of the certification by the New Jersey Supreme Court which reversed the judgment of conviction and sentence.

Respectfully submitted,

s/ Michael E. Wilbert

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